

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

B
Pg 5

74-2484

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2484

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK J. BRASCO,

Defendant-Appellant,

JOSEPH BRASCO,

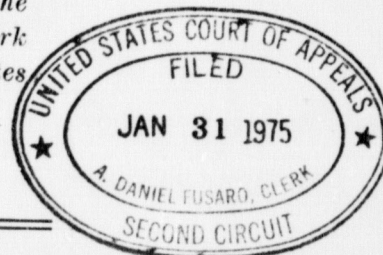
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S APPENDIX

LYON & ERLBAUM
Attorneys for Defendant-Appellant
123-60 83rd Avenue
Kew Gardens, New York 11415
263-3235

PAUL J. CURRAN
*United States Attorney for the
Southern District of New York
Attorney for the United States
of America*



PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

Form No. 100
JAN DOCKET

JUDGE CAMPBELL
JUDGE A. J. J.

A 1
10-29-74
73 CRIM. 985

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	<i>For U. S.:</i>
vs.	E.N. Shaw, Special Atty.
FRANK J. BRASCO	264-3930
JOSEPH BRASCO	
	<i>For Defendant:</i>

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED					
		DATE	NAME	RECEIVED		DISBURSED	
U.S.-3 dpt ✓		10/27/72	Lopez				
U.			Moran				
U.							
XXXXXX T. 21							
Sec. 371							
piracy of receiving							
ery to commit fraud							
st the P.O.Dept.							
e Count)							

PROCEEDINGS

3 Filed indictment.

Both defts.(atty. present) Plead not guilty. Released on thier own recognizance. Motions returnable in 30 days. Case assigned to Judge Wyatt for purposes.

3 Frank Brasco- Filed notice of appearance by Herbert A. Lyon, Esq. 123-60
83rd Ave. Kew Gardens, L.I.N.Y. (Tel 263-3235)

Joseph Brasco-Filed notice of appearance by Herbert A. Lyon, for arraignment only. Weinfeld, J. ONLY COPY AVAILABLE

3 Pre-trial conference held. Trial 2-19-73--Km. 705--Wyatt, J.

ONLY COPY AVAILABLE

DATE	PROCEEDINGS	A 3
74	FRANK BRASCO: Filed affdvt of Michael Charles Eberhardt for writ of habeas — Writ issued to Warden, Federal Penitentiary, Danbury, Conn -Ret. 2-11-74.	
74	Filed various Newspaper clippings regarding the Deft's.	
74	FRANK BRASCO: Filed Defts Memorandum of Law in support of Motion to dismiss indictment.	
74	FRANK BRASCO: Filed Deft's Notice of Motion seeking a dismissal of his indictment.	
74	FRANK BRASCO: Filed Memo Endorsed on the above Motion also filed 2-20-74. The Motion is denied after hearing in open Court on Feb 15 and Feb 19, 1974. SO ORDERED — WYATT, J. (Mailed Notice)	
74	BOTH Defts. - Filed determination of documents called for in subpoena duces tecum.	
74	TRIAL begun with a Jury as to BOTH DEFT'S.	
74	TRIAL cont'd. - Juror #12 excused.	
74	Juror #3 calls in sick. TRIAL adj. to Feb 22, 1974.	
74	TRIAL cont'd.	
74	Filed order permitting an agent of this Court to attend proceeding in the House of Representatives on 2-26-74--Wyatt, J.	
74	Filed Govt's Bill of Particulars.	
74	Trial cont'd.	
74	Trial cont'd.	
74	Trial cont'd.	
74	Trial cont'd.	
74	Deft. Joseph Brasco not present. Sick. Trial adjourned to 3-4-74.	
74	Hearing held.	
74	Deft. Joseph Brasco not present. Court declares a MISTRIAL as to Deft. Joseph Brasco. Trial cont'd as to FRANK BRASCO. Courts Exhibits 10 and 14 ordered sealed and impounded and placed in vault in Room #602 by Judge WYATT.	
74	Trial cont'd.	
74	Trial cont'd.	
74	Trial cont'd.	
74	Trial cont'd.	
2-74	Filed Writ of Habeas Corpus directed to Warden of the Ossining Correctional Facility, Ossining, NY. Writ satisfied 2-11-74.	
	----Cont'd Page #4----	

C

TE	PROCEEDINGS
-74	Trial Cont'd
-74	Trial Cont'd
-74	Trial Cont'd
74	Trial Cont'd
-74	Trial Cont'd - Court charges the jury--Jury deliberating
-74	Jury deliberating.
-74	Jury deliberation cont'd 3:30p.m. Jury disagreement. R.O.R. Indictment sent to Assignment Committee--Wyatt, J.
-74	Filed notice of reassignment.
74	Filed envelope containing memo of law. Ordered Sealed & impounded and placed in vault in Rm. 602 By Wyatt, J.
74	Filed envelope containing Courts Ex. 10. Ordered Sealed & impounded and placed in the vault in Rm. 602 by Judge Wyatt.
74	FRANK J. BRASCO - Filed defts waiver of right to appear personally at a pre-trial conference
74	.BRASCO - Filed memo in support of application as to marshaling evidence.
74	Filed transcript of record of proceedings since Feb. 19, 21, 22, 23, 1974
74	Filed transcript of record of proceedings since Feb. 26, 27, 28, MARCH 1, 2, 1974
74	Filed transcript of record of proceedings since MARCH 4, 6, 7, 8, 1974
74	Filed transcript of record of proceedings since MARCH 11, 12, 13, 14, 15, 1974
74	Both defts- Filed Governments affdvt. and notice of motion for an order rejoining deft. Joseph Brasco for trial with deft. Frank J. Brasco in indictment 73CR 8
-74	Filed pliffs supplementary notice of motion that pliffs will move on 4-18-74 to Cannella, J. for an order rejoining deft Joseph Brasco for trial with deft. Frank as indicated.
3-	Filed order that deft JOSEPH BRASCO undergo a full and complete medical examination on 24th day of April, 1974 at Brookdale Hospital, Eklyn, N.Y. by I. Richard Schwartz, M.D.....Cannella, J.
-74	J. BRASCO - Filed ltr dtd. 4-25-74 from I. Richard Schwartz, M.D., F.A.C.P.
-74	J. BRASCO - Filed memo endorsed on motion filed 4-10-74...The within motion is withdrawn by the Govt...So ordered....Cannella, J.
74	BOTH DEFTS - P.T.C. held & adjd to 5-12-74 2p.m.....Cannella, J.

D

- Cont'd on PAGE 5 -

PROCEEDINGS

- 74 JOSEPH BRASCO - Filed affdvt. in support of motion to be relieved as atty. by Michael J. Gillen, Esq.
- 74 FRANK BRASCO - Filed affdvt. & notice of motion for pre-trial hearing and discovery and inspection. For order dismissing the indictment... Ret. 6-12-74
- 1-74 FRANK J. BRASCO - Filed affdvt. & notice of motion for sequestration of the jury and voir dire examination
- 2-74 JOSEPH BRASCO - Filed order that deft undergo a full and complete medical examination on the 6th of June 74 by Iraj Iraj, M.D.... with marshals return.
- 3-74 FRANK J. BRASCO - Filed memo endorsed on motion of 6-11-74... Motion granted as indicated on record..... Cannella, J.
- 3-74 JOSEPH BRASCO - Filed memo endorsed on motion of 6-7-74..... Motion of Michael J. Gillen to be relieved as counsel for said J. Brasco is granted... Cannella, J...
- 4-74 FRANK J. BRASCO AND JOSEPH BRASCO - The within material is ordered sealed, and placed in the vault in cashier's Dept. of the Clerk's Office in room 602. Subject to further order of the court. So ordered. CANNELLA, J.
- 74 FRANK J. BRASCO - Filed order upon application of deft and over objection the atty. for the govt. ***the Court directs the entry of order which is annexed *** Order of sequestration..... CANNELLA, J.....
- 74 F. BRASCO - Filed affdvt. of B.S. Jones, Spec. AUSA in support of a writ.
- 74 F.J. BRASCO - Second Jury trial begun before Cannella, J., J. Brasco severed from trial.
- 74 Trial cont'd.
- 74 Trial cont'd.
- 74 Trial cont'd.
- 74 Trial cont'd.
- 74 Trial cont'd.
- 74 Trial cont'd.
- 74 Trial cont'd.
- 74 F.J. BRASCO - FILED MEMO and Order that John Masiello, Sr. a witness for the govt. herein, has refused to give any testimony in this case for reasons which appear the record in camera. As a result of such refusal, the witness was adjudged in civil contempt of court, 28 U.S.C. 1826. On Thursday 6-27-74, and was given until 7-1-74 to either purge himself or show cause why he should not be found guilty of criminal contempt. Despite the efforts of the Court, he has refused to testify at trial. The Clerk of the Court is directed to make the foregoing a part of the record in this case, Cannella, J.
- 74 F.J. BRASCO - Filed "warrant For Arrest of Joseph Weiner (Witness). So Ordered,

~~Exhibit from Exhibit~~

74 Filed Manila Envelope containing record etc. ORDERED SEALED AND IMPOUNDED AND
 and in the vault in Room 602 by Cannella, J.

74 Filed Manila Envelope dated 7-5-74, Ordered Sealed and Impounded by Cannella, J.
 put in Clerk's Office, placed in vault of Cashiers Dept. Rm 602.

74 Filed Court's Exhibits 11 & 12 (Memos from Law Clerk Kaplan, T. Judge Cannella,
 TELEPHONE RECORDS - CREDITS) ORDERED SEALED AND IMPOUNDED, in the vault, Room 602
 So Ordered, Cannella, J. dated 7-5-74.

0 Filed transcript of record of proceedings, dated 4-26-74.

8-74 Filed Manila Envelope Exhibit 17 dated 7-17-74, ordered sealed by Cannella, J. and
 Vault, Clerk's Office, Cashier's Dept, Room 602. Cannella, J.

9-74 Filed Manila Envelope containing Courts Exhibit 18 and 24. Telephone Records of
 J. Brasco, Court's exhibit 13. Ordered Sealed and impounded in the vault in Room
 Subject to further order of the Court. dated 7-19-74, Cannella, J.

-74 Trial Cont'd.

-74 Trial Cont'd.

-74 Trial Cont'd.

-74 Trial Cont'd.

-74 Trial Cont'd.

-74 Trial Cont'd.

0-74 Trial Cont'd.

1-74 Trial Cont'd.

2-74 Trial Cont'd.

5-74 Trial Cont'd.

6-74 Trial Cont'd.

7-74 Trial Cont'd.

8-74 Trial Cont'd.

9-74 Trial Cont'd. -and concluded Jury Verdict. -Dft. Guilty. PSI Ordered. Senten
 10-2-74 10:00am R. 1506 Dft. RCP. Cannella, J.

23-74 Filed Govt's proposed examination of prospective jurors.

6-74 F. S. BRASCO Filed transcript of record of proceedings, dated June 20, 21, 24, 25, 1974

74 F. S. BRASCO - Filed transcript of record of proceedings, dated June 26, July 1,
 5, 1974

74 F. S. BRASCO - Filed transcript of record of proceedings, dated July 8, 9, 10, 11, 1974

74 F. S. BRASCO - Filed transcript of record of proceedings, dated July 12, 15, 16, 1974

PROCEEDINGS

- 4-74 JESSE BRASCO - Filed order that deft undergo a medical examination on 9-16-74
- 5-74 FRANK J. BRASCO - Filed transcript of record of proceedings, dated July 18,
- 9-74 FRANK BRASCO - Filed order that deft and his atty. Herbert Lyons as well as all other persons connected in any way with them***cease and desist immediately from contacting any juror in the above case.....CANNELLA, J....
(Mailed notice)
- 8-74 FRANK BRASCO - Filed Govt's order to show cause that Frank Brasco appear and shew cause why he and any atty's***be ordered to cease and desist from interviewing members of the jury....RECO ENDORSED.....Motion granted upon the terms and condition outlined in minutes***Govt. to submit an order as directed....Cannella, J.
- 10-15-74 FRANK J. BRASCO - Filed order that deft's motion pursuant to Fed.R.Crim.P.33 for certain specified post-trial relief in the nature of setting aside the verdict***be and hereby are sealed and is impounded...Cannella, J.
- 10-15-74 F.J.BRASCO - Filed affdvt. of Dominick Barbarino dtd.10-10-74.
- 10-16-74 F.J.BRASCO - Filed affirmation and notice of motion for an order 1. Setting aside the verdict and directing a new trial. 2. Striking the testimony John M. Massi etc....Ret. 10-17-74
- 10-16-74 F.J.BRASCO - Filed order to show cause why an order should not be made quashing subpoena .
- 10-16-74 F.J.BRASCO - Filed amended order that E.M.Shaw as well as all other person***Cease and desist immediately from communicating with any juror***Cannella, J.
- 10-16-74 F.J.BRASCO - Filed affirmation of Herbert M. A. Lyon of actual engagement.
(All entries of 10-16-74 are impounded)
- 10-22-74 F.J.BRASCO - Filed portions of pages 11 and 13 of Barbarino affdvt.***Ordered sealed and impounded....Cannella, J. (In clerk's vault Rm.602)
- *****
/ (#74,833)
- 10-21-74 FRANK J. BRASCO - Filed Judgment (Atty. Herbert Lyon, present) the deft is committed imprisonment for a period of FIVE(5) YEARS, pursuant to Ti.18, U.S.Code, Section 3651, Deft to serve THREE(3) MONTHS in a jail type institution..Execution of the remainder of the sentence is suspended. Deft is placed on probation for a period of fifty-seven months, subject to the standing Probation Order of this Court, and fined \$10,000.00, fine to be paid or deft is to stand committed until fine is paid or deft is to stand committed until fine is paid or he is otherwise discharged according to law, as well as the costs of the prosecution pursuant to Ti.28, U.S.Code, Sec. 1918(b), said fine and costs to be paid at a rate determined by the Probation Dept. in accordance with deft's financial circumstances. Upon payment of said fine and costs of the prosecution the deft is to be placed upon unsupervised probation.....CANNELLA, J....Ent.10-23-74
- Bail to be re-written pending appeal.
- 11-25-74 Filed transcript of record of proceedings, dated 6-12-74

(Continued)

G

Frank J. BRASCO - Filed notice of appeal from judgment of 10-21-74...Copy given to U.S. Atty.

Frank J. BRASCO: Filed Memo Endorsed on order to show cause filed Oct 16-74 to quash subpoena, etc.: Motion is denied for reasons stated on record of hearing before me this date. Minutes of said hearing and contents of the within motion and supporting papers are ordered sealed and impounded subject to further order of the Court. So Ordered. (dated Oct. 16, 1974) CANNELLA, J.

A TRUE COPY

RAYMOND T. FORCHARDT, Clerk

BY A. J. J. J.
Deputy Clerk

H

make 10 copies.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 9

-----x

UNITED STATES OF AMERICA :

- v - :

FRANK J. BRASCO and :
JOSEPH BRASCO, :

Defendants :
-----x

INDICTMENT

73 Cr.

The Grand Jury charges:

INTRODUCTION

1. The defendant FRANK J. BRASCO, at all times relevant to this indictment, was a Member of Congress representing the Eleventh Congressional District of Brooklyn, New York, and was a member of the Post Office and Civil Service Committee of the House of Representatives.

2. The defendant JOSEPH BRASCO is the uncle of the defendant FRANK J. BRASCO.

3. Co-conspirator Joseph Doherty, until on or about June 15, 1968, was employed as Executive Assistant to the Assistant Postmaster General, Bureau of Facilities, United States Post Office Department (hereinafter "the Post Office Department"), Washington, D.C.; thereafter, co-conspirator Joseph Doherty was employed as a consultant in matters relating, among other things, to the Post Office Department, with offices in Washington, D.C.

4. Co-conspirator John A. Masiello, at all times relevant to this indictment, resided at 110 Durst Place, Yonkers, New York, and controlled A.N.R. Leasing Corp., a corporation with its principal office at 332 East 149th

Street, Bronx, New York, which was engaged in the business of leasing trucks to private lessees and also to the Post Office Department. At all times relevant to this indictment, co-conspirator John A. Masiello also controlled Randen Trucking Corp., a corporation with mailing address of 123 First Street, Westbury, Long Island; Bermur Leasing Corp., a corporation with mailing address of 777 Third Avenue, Suite 3100, New York, New York; and T.A.B. Trucking Inc., a corporation with mailing address of 48 Branch Avenue, Freeport, Long Island.

5. On or about June 2, 1967, A.N.R. Leasing Corp., responding to a solicitation for bids on a competitively bid contract, submitted a bid to lease trucks to the Post Office Department for the hauling of mail in New York, New York and Long Island, New York. When the bids were opened on June 5, 1967, it appeared that six other bidders had submitted bids lower than A.N.R. Leasing Corp.

COUNT ONE

1. From in or about June, 1967, up to and including on or about January 4, 1969, in the Southern District of New York, the District of Columbia and elsewhere, FRANK J. BRASCO and JOSEPH BRASCO, the defendants, and Joseph Doherty and John A. Masiello, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown to obtain and retain from the Post Office Department truck leases and monies payable thereunder for co-conspirator John A. Masiello and corporations controlled by him, by unlawful and fraudulent means, to wit, by defrauding the United States in violation of Title 18,

Indictment

A

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3.

United States Code, Section 371, and by committing violations of Title 18, United States Code, Sections 201, 203 and 1341, all as alleged in paragraphs 2 - 7 below.

2. It was a part of said conspiracy that the defendants FRANK J. BRASCO and JOSEPH BRASCO and their co-conspirators unlawfully, wilfully and knowingly would obstruct, hinder and impair the lawful governmental functions of the United States Congress and would defraud the United States of the honest and unbiased services of a Member of Congress, by the payment of money to and for the benefit of the defendant FRANK J. BRASCO in return for the said defendant FRANK J. BRASCO using and having used his office, prestige and influence as a Member of Congress, by unlawful and fraudulent means, to intercede with the Post Office Department for the purpose of causing the Post Office Department to lease trucks from corporations controlled by co-conspirator John A. Masiello, and to pay monies to said corporations pursuant to those leases.

3. It was further a part of said conspiracy that the defendants FRANK J. BRASCO and JOSEPH BRASCO and their co-conspirators unlawfully, wilfully and knowingly would obstruct, hinder and impair the lawful governmental functions of the Post Office Department and would defraud the United States of the honest and unbiased services of an official of the Post Office Department, by the payment of money to and for the benefit of co-conspirator Joseph Doherty in return for the said co-conspirator Joseph Doherty using and having used his office, prestige and influence as an official of the Post Office Department, by unlawful and fraudulent means, to cause the Post Office Department to lease trucks from corporations controlled by co-conspirator John A. Masiello, and to pay monies to said corporations pursuant to those leases.

4. It was further a part of said conspiracy that the defendants FRANK J. BRASCO and JOSEPH BRASCO, with knowledge that the Post Office Department had cancelled its truck leasing contract with A.N.R. Leasing Corp on the ground that co-conspirator John A. Masiello and others associated with A.N.R. Leasing Corp. had criminal records and backgrounds, would unlawfully, wilfully and knowingly defraud the Post Office Department by arranging to assist and assisting co-conspirator John A. Masiello in obtaining truck leases with the Post Office Department for other corporations which were in fact controlled by co-conspirator John A. Masiello, but which would appear to the Post Office Department to have independent management and control.

5. It was further a part of said conspiracy that co-conspirator John A. Masiello would unlawfully, wilfully, knowingly and corruptly, directly and indirectly, offer and promise money and other things of value and the defendants FRANK J. BRASCO and JOSEPH BRASCO and co-conspirator Joseph Doherty would unlawfully, wilfully and knowingly ask, demand, exact, solicit, seek, accept, receive and agree to receive said money and other things of value on behalf of themselves and others, in return for the defendant FRANK J. BRASCO and co-conspirator Joseph Doherty being influenced in the performance of official acts, being influenced to commit and aid in committing and collude in and allow a fraud and make opportunity for a fraud on the United States, and being influenced to do and omit to do acts in violation of their official duties, in connection with the leasing of trucks by the Post Office Department from corporations controlled by co-conspirator John A. Masiello.

6. It was further a part of said conspiracy that the defendants FRANK J. BRASCO and JOSEPH BRASCO, otherwise than as provided by law for the proper discharge of official duties, would unlawfully, wilfully and knowingly receive, agree to receive, ask, demand, solicit and seek compensation for services rendered and to be rendered by the defendants FRANK J. BRASCO and JOSEPH BRASCO and by co-conspirator Joseph Doherty and others, at a time when the defendant FRANK J. BRASCO was a Member of Congress, in relation to a proceeding, application, request for a ruling and other determination, contract, claim, controversy and other particular matter in which the United States was a party and had a direct and substantial interest, before the Post Office Department, in connection with the leasing of trucks by the Post Office Department from corporations controlled by co-conspirator John A. Masiello.

7. It was further a part of said conspiracy that the defendants FRANK J. BRASCO and JOSEPH BRASCO and their co-conspirators would unlawfully, wilfully and knowingly devise and intend to devise a scheme and artifice to defraud the United States and its departments, agencies and branches as alleged in detail in paragraphs 2 through 5 of this Indictment, and for the purpose of executing said scheme and artifice and attempting so to do, would place and cause to be placed in post offices and authorized depositories for mail matter, things to be sent and delivered by the Post Office Department, and would take and receive and cause to be taken and received therefrom such things, and would knowingly cause such things to be delivered by mail according to the directions thereon and at the places at which they were directed to be delivered by the persons to whom they were addressed.

8. Among the specific means by which the defendants FRANK J. BRASCO and JOSEPH BRASCO and their co-conspirators carried out the conspiracy were the following:

(a) Beginning in or about June, 1967, the defendants FRANK J. BRASCO and JOSEPH BRASCO corruptly endeavored with co-conspirator Joseph Doherty and others to obtain and retain for co-conspirator John A. Masiello truck leases with the Post Office Department through corporations controlled by co-conspirator John A. Masiello, in return for which, in or about May, 1968, co-conspirator John A. Masiello delivered \$10,000 in cash to defendant JOSEPH BRASCO.

(b) Beginning in or about January, 1968, the defendants FRANK J. BRASCO and JOSEPH BRASCO corruptly endeavored with co-conspirator Joseph Doherty and others to obtain for A.N.R. Leasing Corp. and co-conspirator John A. Masiello a loan of \$875,000 with which to finance the purchase of trucks which had been bought by A.N.R. Leasing Corp. to lease to the Post Office Department, pursuant to an arrangement that a fee to be paid by A.N.R. Leasing Corp. for obtaining said loan would be shared, in part, as follows: \$17,500, in cash, to be delivered to defendant JOSEPH BRASCO for defendant FRANK J. BRASCO, and \$8,750 for co-conspirator Joseph Doherty.

(c) Beginning on or about June 1, 1968, with knowledge that the Post Office Department had cancelled its truck leasing contract with A.N.R. Leasing Corp. on the ground that co-conspirator John A. Masiello and others associated with A.N.R. Leasing Corp. had criminal records and backgrounds, defendants FRANK J. BRASCO and JOSEPH BRASCO corruptly and fraudulently arranged to assist and assisted co-conspirator John A. Masiello in obtaining truck leases with the Post Office Department for other corporations which were

in fact controlled by co-conspirator John A. Masiello, but which would appear to the Post Office Department to have independent management and control.

OVERT ACTS

In furtherance of, and to effect the objects of, said conspiracy, the defendants and co-conspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

1. In or about June, 1967, the defendant JOSEPH BRASCO and co-conspirator John A. Masiello were present at a meeting in Brooklyn, New York.

2. In or about June, 1967, the defendant FRANK J. BRASCO and co-conspirators John A. Masiello and Joseph Doherty were present at a meeting at the defendant FRANK J. BRASCO'S Congressional office in Washington, D.C.

3. On or about October 10, 1967, co-conspirator John A. Masiello caused A.N.R. Leasing Corp. to mail a bid at a rate of \$33 per diem for the leasing of trucks to the Post Office Department in New York, New York, c/o Postmaster, Room 3002 General Post Office, New York, New York 100J1.

4. On or about April 11, 1968, the defendant FRANK J. BRASCO and co-conspirators John A. Masiello and Joseph Doherty were present at a meeting at the law offices of the defendant FRANK J. BRASCO in New York, New York.

5. On or about April 26, 1968, co-conspirator John A. Masiello received a telegram.

6. In or about May, 1968, the defendant JOSEPH BRASCO received \$10,000 in cash from co-conspirator John A. Masiello at Gardio's Neapolitan Restaurant on 149th Street in the Bronx, New York.

7. On or about May 24, 1968, co-conspirator Joseph Doherty caused the preparation of a letter from Joseph Doherty to A.N.R. Leasing Corp.

8. On or about June 24, 1968, co-conspirator John A. Masiello caused Randen Trucking Corp. to enter a bid at a rate of \$33.50 per diem for the leasing of trucks to the Post Office Department in New York, New York.

9. On or about June 24, 1968, co-conspirator John A. Masiello caused Bermur Leasing Corp. to mail a bid of \$37.50 per diem for the leasing of trucks to the Post Office Department, in New York, New York, c/o Postmaster, Room 3002, General Post Office, New York, New York 10001.

10. From on or about July 1, 1968, up to and including October 25, 1968, co-conspirator John A. Masiello caused Randen Trucking Corp. to deliver trucks to the Post Office Department for the hauling of mail.

11. On or about November 15, 1968, defendant FRANK J. BRASCO had a conversation with co-conspirator Joseph Doherty.

12. On or about November 15, 1968, co-conspirator John A. Masiello caused A.N.R. Leasing Corp. to enter a bid of \$37 per diem for the leasing of trucks to the Post Office Department, in New York, New York.

13. On or about November 15, 1968, co-conspirator John A. Masiello caused Bermur Leasing Corp. to enter a bid of \$37.50 per diem for the leasing of trucks to the Post Office Department, in New York, New York.

14. On or about November 15, 1968, co-conspirator John A. Masiello caused T.A.B. Trucking Inc. to enter a bid of \$40.00 per diem for the leasing of trucks to the Post Office Department, in New York, New York.

15. On occasions from June, 1968, to and including November, 1968, the defendants FRANK J. BRASCO and JOSEPH BRASCO had conversations with co-conspirator John A. Masiello.

~~15~~ 16. From on or about November 16, 1968, up to and including on or about January 4, 1969, co-conspirator John A. Masiello caused Bermur Leasing Corp. to deliver trucks to the Post Office Department for the hauling of mail.

(Title 18, United States Code, Section 371)

FOREMAN

PAUL J. CURRAN
United States Attorney

JUDGMENT OF CONVICTION

A 18

United States District Court

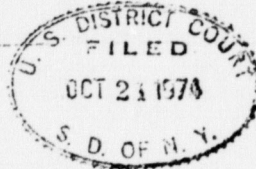
FOR THE

SOUTHERN DISTRICT OF NEW YORK

United States of America

FRANK J. CRASCO

No. 73 Cr. 985



On this 21st day of October, 1974, came the attorney for the
 Plaintiff and the defendant appeared in person and by Herbert Lyon, Esq.

It is ADJUDGED that the defendant upon his plea of² Not Guilty, and a verdict
 of Guilty,
 has been convicted of the offense of unlawfully, wilfully and knowingly did
 conspire, confederate and agree with others, to obtain and retain
 from the Post Office Department truck leases and monies payable,
 by unlawful and fraudulent means, to wit, by defrauding the United
 States in violation of Title 18, U.S. Code, Sec. 371 and by com-
 mitting violations of Title 18, U.S.C., Secs: 201, 203 and 1341
 (Title 18, U.S. Code Sec. 371).

MICROFILM

OCT 24 1974

as charged³
 and the court having asked the defendant whether he has anything to say why judgment should not
 be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or
 his authorized representative for imprisonment for a period of Five (5) years, pursuant
 to Title 18, U.S. Code, Sec. 3651, Defendant to serve three (3)
 months in a jail type institution. Execution of the remainder of the
 sentence is suspended. Defendant is placed on probation for a period
 of fifty-seven (57) months, subject to the standing Probation Order
 of this Court, and fined \$10,000.00, fine to be paid or Defendant is
 to stand committed until fine is paid or he is otherwise discharged
 according to law, as well as the costs of the prosecution pursuant to
 Title 28, U.S. Code, Sec. 1918(b), said fine and costs to be paid at
 a rate determined by the Probation Department in accordance with
 Defendant's financial circumstances. Upon payment of said fine and
 costs of the prosecution the Defendant is to be placed upon unsuper-
 vised probation.

- Bail Pending Appeal -

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the
 United States Marshal or other qualified officer and that the copy serve as the commitment of the
 defendant.

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

By

John M. Connella
 United States District Judge.

The Court recommends commitment to

Raymond F. Burghardt
 Clerk.

Insert by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights
 to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon
 stated that he waived the right to the assistance of counsel." Insert (1) "guilty and the court being satisfied
 there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of
 guilty," or (4) "nolo contendere," as the case may be. Insert "in count(s) number" if required
 by the sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or con-
 secutively, when such term is to begin with reference to termination of preceding term or to
 expiration of such term; (3) whether defendant is to be further imprisoned until payment of
 fine and costs, or until he is otherwise discharged as provided by law. Enter any order with respect to
 commitment for use of Court to recommend a particular institution.

OPINION OF JULY 1, 1974 ON MASIELLO'S REFUSAL TO TESTIFY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES of AMERICA :
 :
-against- :
 : MEMORANDUM
FRANK J. BRASCO, :
 :
Defendant. : 73 Cr. 985
 : (JMC)
-----X

CANNELLA, D.J.:

John Masiello, Sr., a witness for the government herein, has refused to give any testimony in this case for reasons which appear on the record in camera. As a result of such refusal, the witness was adjudged in civil contempt by the Court, 28 U.S.C. § 1826, on Thursday, June 27, 1974 and was given until today, July 1, 1974 to either purge himself thereof or to show cause why he should not be found guilty of criminal contempt.* Fed.R. Crim.P. 42(b); United States v. Marra, 482 F.2d 1196 (2 Cir. 1973); United States v. Wilson, 488 F.2d 1231 (2 Cir. 1973). Today, despite the efforts of the Court,

* The precise factual and procedural details of Masiello's refusal to testify and the resulting contempt proceedings against him need not be recited here, other than to note their full amplification on the record of this trial.

the attorney for the government and Masiello's own attorney, the witness has again refused to testify at this trial. In light of these circumstances, the Court has concluded that Masiello's prior testimony, given at the first trial of this case and subject to full and complete cross-examination at that time, is admissible in evidence at this trial under the former testimony exception to the hearsay rule, the testimony now being unavailable.

DISCUSSION

The former testimony exception to the hearsay rule allows the introduction of a witness' testimony at a prior trial, otherwise hearsay, upon a showing that the witness is now unavailable to testify. The rule has three facets:

- 1) That the witness is unavailable;
- 2) That the defendant has had adequate opportunity to cross-examine the witness at the prior trial - so as not to affront the confrontation clause of the Sixth Amendment. See, e.g., California v. Green, 399 U.S. 149 (1970);
- 3) An identity of issue between the proceedings.

In the classic statement of the rule, unavailability

was proved by the showing of certain exigent circumstances not inclusive of refusal to testify -- i.e., death or severe disability of the witness; an assertion of privilege; absence from the jurisdiction and the like. See, 5 Wigmore on Evidence §§ 1403-1413 (3d ed.) The New York rule is in accord and does not list the refusal of a witness to testify as grounds for unavailability. N.Y. Crim.Proc.L. § 670.10. See also, Richardson on Evidence § 276 (9th ed. Prince). However, neither the classic common law formulation of unavailability nor New York law are controlling on this Court. Rather, the Court must proceed in compliance with Rule 26 of the Federal Rules of Criminal Procedure, which states, in pertinent part:

. . . The admissibility of evidence . . . shall be governed . . . by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

Thus, unlike its counterpart in the civil rules, Fed.R.Civ. P. 43(a), the criminal rule does not look to state law (here New York) for guidance, but rather contemplates a uniform body of federal criminal evidence law. See, e.g., United States v. Provoo, 215 F.2d 531 (2 Cir. 1954); Advisory Committee Note to Rule 26; 3 Orfield, Criminal

Procedure under the Federal Rules §26.15. It is, therefore, incumbent upon the Court to seek out federal precedent in this area or, absent such, fashion an appropriate rule in conformity with the strictures of Rule 26.

On the present issue, namely, whether Masiello's refusal to testify under the circumstances of this case, as they regard him, renders him unavailable, the Court need not fashion a rule of its own. The decision of the Court of Appeals for the Tenth Circuit in Mason v. United States, 408 F.2d 903 (10 Cir. 1969), cert. denied, 400 U.S. 993 (1971) is both dispositive and in complete accord with the Court's own thinking.

In Mason, certain witnesses who testified at the first trial of the defendant refused to testify at the second trial, asserting their Fifth Amendment privilege against self-incrimination. They were granted immunity but continued in their refusals. The district court, thereupon, appointed counsel for them and made further efforts to have them testify. These efforts being unsuccessful, each of these witnesses was held in contempt by the court.

In view of such circumstances, the district court permitted the introduction of these witnesses' testimony at the former trial, "on the ground that the testimony

was unavailable since the witness, although called and present in court, refused to testify." 408 F.2d at 905. The Court of Appeals affirmed, finding first, that the defendant had not been deprived of his Sixth Amendment right to confrontation, and, second, that the witnesses were, as a matter of law, unavailable. The Court stated:

We consider . . . that the important element is whether the testimony of the witness is sought and is available and not whether the witness's body is available The record here shows that the trial judge did all that was reasonable and proper to have the witnesses testify We hold that the trial judge was not in error in permitting the use of the witnesses' testimony at the prior trial under the circumstances and in the manner he did.

408 F.2d at 906. The Court of Appeals further held that any explanation to the jury of the use of such former testimony, in the stead of live witnesses, rested within the discretion of the trial court.

Mason has been approvingly cited in later appellate cases. United States v. Milano, 443 F.2d 1022, 1029 (10 Cir. 1971); United States v. Allen, 409 F.2d 611, 613 (10 Cir. 1969). And see, United States v. Wilcox, 450 F.2d 1131, 1138 (5 Cir. 1971); United States v. Mobley, 421 F.2d 345 (5 Cir. 1970) (wherein the Court stated

[the witness'] silence in reliance, albeit misplaced, on Fifth Amendment rights, makes him no less unavailable than death or absence from the country or physical inability to speak.", at 351). The courts of this Circuit have not adopted a contrary view. Cf., United States v. Singleton, 460 F.2d 1148 (2 Cir. 1972).

In addition, Rule 804(a) of the Proposed Federal Rules of Evidence, clearly would allow the use of Siello's prior testimony in these circumstances:

(a) . . . "Unavailability as a witness" includes situations in which the declarant:

. . . .

- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so . . .

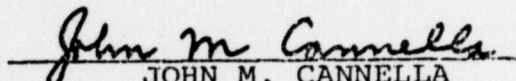
be it these rules are not yet the law and might never so become, they represent the product of years of thought and research by leading scholars in the field and by members of the judiciary, as well as the Supreme Court's stamp of approval. As such, the provisions of the proposed rules are persuasive on the court in fulfilling its function under Rule 26.

For all of the reasons above-stated, the Court

finds the witness, John Masiello, Sr., unavailable as a matter of law, and allows the introduction of his testimony at the first trial in evidence in this case under the former testimony exception to the hearsay rule.

The Clerk of the Court is directed to make the foregoing a part of the record in this case.

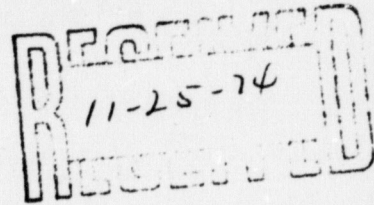
SO ORDERED.


JOHN M. CANNELLA
United States District Judge

Dated: New York, N. Y.
July 1, 1974.

OPINION OF NOVEMBER 22, 1974, DENYING RELIEF UNDER RULE 33, F.R. Cr. P.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X

UNITED STATES of AMERICA

MEMORANDUM OPINION

-against-

FRANK J. BRASCO,

73 Cr. 985
(JMC)

Defendant.

----- X

CANNELLA, D.J.:

After a trial of some four weeks in duration, a jury found Frank J. Brasco, a United States Congressman, guilty of conspiracy, 18 U.S.C. § 371, to violate three substantive federal statutes (18 U.S.C. §§ 201, 203 and 1341). On October 10, 1974, in advance of imposition of sentence, Brasco moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In so moving, he asserted two grounds: (1) "directing that a new trial be conducted due to the improper conduct and handling of the jury during sequestration;" and (2) "[s]triking the testimony [of] John M. Masiello, and setting aside the verdict and directing that a new trial be conducted...." After an evidentiary hearing which was conducted on October 19 and 21, 1974, the Court ruled upon this motion as follows: "The motion

is denied as to the first ground stated, memorandum to be filed, and as to the second ground stated upon memorandum previously filed [Memorandum of July 1, 1974]." The ensuing paragraphs constitute the memorandum referred to in the Court's earlier ruling.

THE STANDARD

The general propositions and rules of law which are applicable to a motion for a new trial premised upon an assertion of misconduct by trial jurors have been cogently and succinctly stated by Judge Harvey in United States v. Rocks, 339 F. Supp. 249, 253-54 (E.D.Va. 1972).

With limited exceptions it is a settled rule that a juror's testimony is not receivable to impeach his own verdict. (citations omitted) The inviolability of the jury room from outside influence of any sort is a prime necessity in the administration of justice. (citations omitted) As the Supreme Court said in McDonald v. Pless, 238 U.S. 264, 267 (1915), "if there were not strict limits to inquiries into jury verdicts after they had been returned, then jurors 'would be harrassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.' [Litigation] must be terminated at some reasonable point and if jurors could, without limitation, be examined concerning their deliberations and their verdict, the result would be to make what was intended to be a private deliberation into a constant subject of public investigation impeding frankness and freedom of discussion in the jury room. (citations omitted)

In United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), cert. den. Mittleman v.

United States, 368 U.S. 984 (1962), the Court listed the dangers inherent in a post-verdict inquiry into jury verdicts as follows (at 950):

"There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harrassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain."

An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's constitutional right to be confronted with the witnesses against him. (citation omitted) Thus, a juror may testify to facts bearing upon the question of the existence of any such extraneous influence, but not as to how far that influence operated upon his mind. (citations omitted) [A new] trial is mandatory if it appears in a criminal case that individual jurors have read newspaper articles containing incompetent and prejudicial information. (citation omitted) However, the manner in which a Court should determine whether a jury has been subjected to outside influence should be left to the discretion of the trial judge. Marshall v. United States, 360 U.S. 310 (1959). As the Supreme Court said in that case (at page 312):

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Holt v. United States, 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts."^{1/}

In this regard, it must be noted that prejudice on the part of any juror is not presumed, rather, the defendant must

prove prejudice by a preponderance of the credible evidence. United States v. Cashio, 420 F.2d 1132, 1136 (5 Cir.), cert. denied, 397 U.S. 1007 (1970); United States v. Provenzano, 240 F. Supp. 393 (D.N.J.), aff'd, 353 F.2d 1011 (3 Cir. 1965) (per curiam), cert. denied, 384 U.S. 905 (1966).

THE "OTHER GROUNDS"

In accordance with the principles set forth above, as well as the directive of Mr. Justice Clark, sitting by designation, in United States v. Rattenni, 480 F.2d 195 (2 Cir. 1973), that the Court ask each juror individually whether the extrajudicial matter which allegedly came to the jury's attention biased or prejudiced that juror in any fashion against the defendant, this Court directed that a post-trial evidentiary hearing be conducted concerning the matters contained in defendant's motion. In advance of such hearing, the attorney for the Government conceded as true for purposes of the motion each and every allegation of the moving affidavits except for that which asserted improper conduct and prejudice on the part of several jurors as the result of their having read a newspaper account directed at Masiello's failure to testify at trial.^{2/} The Court is of the view that the attorney for the Government correctly conceded the points which he did. These allegations,

at best, demonstrate violations of the Court's sequestration order either by the members of the jury or the marshals assigned to supervise the panel. However, accepting these assertions as true, the Court is unable to perceive one scintilla of prejudice inuring to the defendant as a result. Defendant wholly failed to show that at the point in time that the case was given to the panel for^{its} deliberations, any juror was intoxicated, fearful or otherwise incapacitated or unable to discharge his or her duties by incidents which had occurred during the sequestration. In short, Brasco has failed to sustain the initial burden of alleging any prejudice as a consequence of these incidents.^{3/}

THE NEWSPAPER ACCOUNT

At the hearing which was conducted by the Court with regard to the allegation of prejudice to the defendant as a result of the "Masiello newspaper article" (the article in question is said to have discussed the refusal of Masiello to testify at trial and is alleged to have given the reason therefore as his concern over the health of his wife and the consequences that his giving testimony would have upon her),^{4/} ten of the trial jurors were present and gave testimony under oath. In

addition, one juror, Mrs. Anderson, was interviewed by the Court via telephone, as she was at that time visiting her son in Iowa and, another juror, Mr. Aponte, was interviewed by the Court subsequent to the completion of the evidentiary hearing but prior to the filing of this memorandum. ^{5/}

Brasco raised the issue concerning the "Masiello newspaper report" by means of the affidavit of Dominick Barbarino, submitted in support of the motion.

... Marie Purpo stated that during the course of the trial she had occasion to be in one of the recreation rooms at the Skyline Motel, at approximately 1:00 A.M., at which time she was approached by a fellow juror, Edward Hutton. Hutton then showed her a newspaper article from The New York Post. (Hutton told her that he had read the entire article). She then told me that she read a portion of the article and that it stated, in words or substance, that John Masiello had refused to testify at the Brasco trial because he feared that by testifying he would place his wife's life in jeopardy. She further stated that she and Mr. Hutton ripped the article out of the newspaper and flushed it down the toilet. Marie Purpo described said article as being a long, thin article. She further advised me that the following morning she and Mr. Hutton told Marshal Bob White what had happened regarding the newspaper article and that she was unaware of what, if any, action Mr. White took upon receiving the information.

Barbarino Affidavit at 4-5. The issue thus framed, each

juror was questioned individually concerning the newspaper incident.

The two principal "offenders" according to Barbarino, Miss Purpo and Mr. Hutton, both testified under oath and each denied the essential elements of Barbarino's account. Miss Purpo testified unequivocally that she did not, at any time, read the substance of the newspaper account.^{6/} This testimony is corroborated by a statement made by Juror Purpo during a telephone conversation with Mr. Barbarino, which was taped by Barbarino without Purpo's knowledge or consent.

(Tr. at 232-36)

The following questions of the Court and responses by Miss Purpo are instructive:

Q. Miss Purpo, at any time from the time that you heard the charge from the Court and you went into the jury room and you deliberated until the time that you came up with a verdict, was there anything in your own mind which in any way you feel was affected by the fact that you had seen this article?

A. No, sir. Definitely not.

Q. And your judgment was not in any way affected by the fact that you had seen and torn up this article, or whoever tore it up, and flushed it down in the bathroom, wherever it was?

A. No.

Q. Was it any part of your judgment or in the deliberations did you take this into consideration at all in any shape or fashion?

A. It was forgotten, Judge.

Tr. at 50-51.

Mr. Hutton, the other juror alleged by Barbarino to have read the newspaper account of Masiello's refusal to testify, flatly denied any knowledge of the reasons for Masiello's refusal to testify. In substance, Hutton testified that he had come upon the involved newspaper account of the trial while perusing an edition of The New York Post and that, upon observing the headline and the initial portion of the story, he realized that it concerned the trial and immediately ceased further reading of it; subsequently, he destroyed the article.^{7/} Questioned by the Court, Mr. Hutton stated:

Q. Am I right in summarizing your testimony to the effect while you saw this article, and you indicated it was about the case, you never told anybody even about what you had read as far as you had gone, and nobody else saw it, as far as you knew?

A. I indicated the title that I had read.

Q. The title, the stand-in?

A. Yes. But beyond that, nothing, because I had not myself read it.

Q. Then you didn't say [should read see] any of the other things that appear in the article further on past the first mention of his [Masiello's] name?

A. No, sir.

Tr. at 91-92. Thereafter, the next day, Mr. Hutton gave further answers to questions addressed by the Court:

THE COURT: When you entered in your deliberations in the jury room at the time you arrived at a verdict, what, if anything, about that article did you remember. What did it say as far as you were concerned?

A. What I remembered was what I said, that the heading was something like, "stand-in testifies for mob figure."

THE COURT: Anything else?

A. And -- no. That was it, and that I had seen the name Masiello in the article and that is when I decided not to read it, obviously.

THE COURT: And that is all you knew at the time you started your deliberations?

A. Yes, sir.

THE COURT: Did you know, for example, at that time that it was alleged in that article that Masiello refused to testify because of the fact that his wife's health was concerned and there was some threat of his being out on a contract or some such language?

A. No, I didn't know that.

THE COURT: You didn't know that?

A. No, I did not.

THE COURT: Did anything that appeared in the article in any way interfere with your judgment or prejudice you in any way against the defendant as far as you yourself were concerned?

A. No, sir.

Tr. at 281-82.

In addition to Jurors Hutton and Purpo each and every other juror that participated in the deliberation and decision of this cause was questioned concerning the "newspaper incident." Four jurors stated that they were wholly unaware of the Masiello article or the incidents surrounding its discovery by Hutton.^{8/} Six other jurors recounted that while they were aware of the article and the incident surrounding its discovery, they had no knowledge of the substance of its contents.^{9/} Upon the inquiry of the jurors, this Court unhesitatingly concludes that no juror had any knowledge whatever of the sum or substance of the "Masiello newspaper account."

The encounter of several of the trial jurors with the "Masiello" newspaper article is not to be considered by the Court as per se prejudicial to the defendant. "Whether publicity is so prejudicial as to require a new trial is ordinarily committed to the trial judge's discretion. 'Generalizations beyond that statement are not profitable, because each case must turn on

its special facts.'" United States v. Armone, 363 F.2d 385, 396 (2 Cir.) (quoting from, Marshall v. United States, 360 U.S. 310, 312), cert. denied, 385 U.S. 957 (1966). Rather, on the instant record, the Court finds that defendant has failed to sustain his burden of proving that any juror who came into contact with the newspaper article was thereby prejudiced against him or that the incident in any manner acted to impair his securing of a fair trial, "Even if the jurors read the article referred to, that alone is not ground for a new trial.... The burden was upon counsel for defendant to show that prejudice resulted, and he failed to establish such prejudice." Gicinto v. United States, 212 F.2d 8, 10-11 (8 Cir.), cert. denied, 348 U.S. 884 (1954).

This Court has had ample opportunity to observe these jurors throughout the trial of this case, as well as their demeanor and bearing when called as witnesses upon the hearing of this motion. During the trial, the jurors conducted themselves in an alert and intent fashion and, the manner in which they conducted their deliberations (as is well evidenced by the pointed and relevant questions going to the heart of the case which were asked by them) demonstrates their understanding of both the law and the facts; this jury did not appear to

the Court to be inattentive, disinterested or close-minded. As witnesses, each juror impressed the Court as an honest and sincere individual who had discharged his or her duty in accordance with the juror. Each juror that had come into contact with or had been made aware of the "Masiello" article, unequivocally stated that his judgment in this case was not affected by this extrajudicial account and that he was not prejudiced against the defendant in any fashion whatever because of it. The Court believes these jurors. Notwithstanding the testimony of Messrs. Lyon and Erlbaum and that of Miss Romaner, the Court believes the in-court testimony of Miss Purpo.^{10/} She stated, under oath, that she had seen only "the heading and ... the first paragraph" of the article, but that she "didn't even read it." The Court believes this statement, as well as her representation that the newspaper incident "was forgotten" and did not in any way affect her judgment in this case.

As has been stated, "[t]he mere fact that jurors have read newspaper accounts of the trial in which they are participants is not ground for a new trial," Bratcher v. United States, 149 F.2d 742, 746 (4 Cir.), cert. denied, 325 U.S. 885 (1945), rather, "[t]he crucial question in cases such as this is the degree of prejudice

created by the improper publicity, since a new trial is required only when substantial prejudice has occurred." United States v. D'Andrea, 495 F.2d 1170, 1172 (3 Cir. 1974). On the state of the record before it, not only does the Court perceive no substantial prejudice to the defendant as a consequence of the jurors' contact with the article, but, indeed, the Court can not find the slightest suggestion of prejudice of whatever nature to have been demonstrated by the defendant. See, e.g., United States v. Wilshire Oil Co. of Texas, 427 F.2d 969, 975 (10 Cir.), cert. denied, 400 U.S. 829 (1970). While it is true that a "verdict must be set aside where even one juror in effect admits prejudice; after all, a defendant is entitled to twelve fair and impartial jurors...." United States v. Rattenni, 480 F.2d at 198, here, no juror has so admitted and the Court cannot, on this record, so infer.

CONCLUSION

It was upon the request of the defendant and over the objection of the Government that the Court acted to sequester the jury in this cause. It did so in an effort to better insure that the defendant would receive a fair trial in what might be termed a "high publicity" case. But a fair trial does not mean a perfect

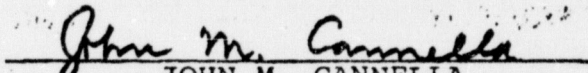
trial and the defendant, despite his protestations, did receive a fair trial and the verdict of an impartial jury.

This is not to say that violations of the Court's sequestration order did not occur. The proof well demonstrates that they did, and that several jurors did come into contact with extrajudicial matter. But perfection is far too elusive a standard upon which the fairness of a trial might be judged and sequestration can not be viewed as "perfection" insurance. Rather, sequestration is but a means invoked by the Court to effectuate the goal of affording a defendant a fair trial by a fair and unbiased jury. Dissatisfied litigants should not, upon the close of their own trial, proceed to try the jury upon assertions of irregularities and hearsay innuendo. In the opinion of this court, taking into account the myriad of circumstances surrounding the nature and conduct of this trial, Frank Brasco received a fair trial and was found guilty by a fair jury composed of honest, sincere and unbiased people. As Mr. Justice Story, sitting as Circuit Justice in United States v. Gibert, 25 F. Cas. 1287, 1310 (No. 15,204) (C.C.D. Mass. 1834), well stated with respect to a sequestered jury:

We must take things as they are in our days. Juries cannot now, as in former ages, be kept in capital cases upon bread and water, and shut up in a sort of gloomy imprisonment, with nothing to occupy their thoughts. It would probably be most disastrous to the administration of justice, and especially to prisoners, to attempt, in these days, the enforcement of such rigid severities, so repugnant to all the usual habits of life. And for one, I am not satisfied that the irregularity in the present case has been in the slightest manner prejudicial to the prisoners.... The indulgence ceased the moment when the charge was given, and the jury was then put upon their own solemn and exclusive deliberations on the case.

The Clerk of the Court is hereby directed to incorporate this memorandum opinion into the files and records of this cause.

It is SO ORDERED.


JOHN M. CANNELLA
United States District Judge

Dated: New York, N. Y.
November 22, 1974.

(Citations omitted). See also, *Mattox v. United States*, 146 U.S. 140 (1892); *United States v. Dioguardi*, 492 F.2d 70, 78-81 (2 Cir.), cert. denied, 43 U.S.L.W. 3212 (Oct. 15, 1974) (No. 73-1621); *United States v. Rattenni*, 480 F.2d 195 (2 Cir. 1973); *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2 Cir. 1970), cert. denied, 402 U.S. 906 (1971); *Miller v. United States*, 403 F.2d 77, 83-84 (2 Cir. 1968); *United States v. Procaro*, 356 F.2d 614 (2 Cir.), cert. denied, 384 U.S. 1002 (1966); 8 Wigmore, Evidence § 2349 et seq. (McNaughton Rev. 1961); ABA, Standards Relating to Trial by Jury § 5.7.

The other instances of jury misconduct asserted by Brasco in support of the motion are: (1) a beer party where seventy cans of beer were in a bathtub; (2) broken windows in juror Rivera's room; (3) non-monitoring of telephone calls; (4) non-supervision of Sunday buffets; (5) excessive drinking of intoxicants on the night before deliberations; (6) home visits of Jurors Lazarcu and Anderson; (7) "the man-handling of the jurors by the marshals, including arbitrary refusal to allow the jurors reasonable exercise;" and (8) visits by jurors to the beauty parlor and barber shop.

See, e.g., *United States v. Procaro*, 356 F.2d at 618-19; *Baker v. Hudspeth*, 129 F.2d 779, 782-83 (10 Cir.) ("[T]he use of intoxicants has no proper place... in the administration of justice and its use cannot be condoned where justice sits, but there is nothing in this record from which it can be inferred that any juror was intemperate, or that his conduct was unbecoming to a gentleman. Furthermore, nothing but ugly and ill-founded insinuations can be drawn from the association of the jurors with the lady Deputies."), cert. denied, 317 U.S. 681 (1942); Annotation, Use of Intoxicating Liquor by Jurors: Criminal Cases, 7 A.L.R. 3d 1040 (1966 and Supp. 1974).

It is to be noted that Jurors Purpo and Hutton have each identified a different article as that which was in the Post on the night in question: Hutton, petitioner's exhibit 1 and Purpo, petitioner's exhibit

2 (exhibit A to Barbarino affidavit) (this article, ex. 2, also makes reference to a purported "contract" being out on Masiello's life).

At the hearing, in order to prevent impermissible questioning of the jurors beyond the limited scope for which the Court was convened, the Court placed certain restraints on the nature of the questions which were to be asked by counsel, and, in some instances, conducted the inquiry itself. See, e.g., Miller v. United States, supra; United States v. Rocks, supra.

The present post-trial motion alleging misconduct on the part of the trial jurors and the Marshals arose as a result of a "systematic" post-verdict investigation on Brasco's behalf by Mr. Barbarino and others, with the knowledge of Mr. Lyon, Brasco's attorney, but without first informing or seeking the approval of the Court or the attorney for the Government. This type of unsupervised inquiry is neither approved of nor condoned by this Court. Rather, the Court heartily subscribes to the views recently expressed by Judge Brewster in *United States v. Sanchez*, 380 F. Supp. 1260, 1265-66 and n. 12 (N.D.Tex. 1973). See also, United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967); *United States v. Miller, supra*; Code of Professional Responsibility, EC-7-29-7-32 and DR-7-108. In this regard, it is well remembered that

[h]e who makes studied inquiries of jurors ... acts at his peril, lest he be held as acting in obstruction of the administration of justice.... [A] searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it.

Rakes v. United States, 169 F.2d 739, 745-46 (4 Cir. 1948). Hence, all post-trial questioning of jurors must only be conducted under the strict supervision and control of the court, with the inquiry restricted to those matters found by the court as both relevant and proper.

The relevant portions of Miss Purpo's testimony are as follows:

Q. Did you read some of the article?

A. I didn't read the article but from what I was told by Mr. Hutton, it had to do with the Brasco case.

THE COURT: Never mind what you were told. You didn't read the article, period. Strike out the rest of it.

Q. Did you see some of the article, the first paragraph of the article?

A. I saw it.

Q. Did you see enough to have any idea of what the article was about?

A. No.

Q. Now I am going to ask you, were you told anything about the contents of the article?

A. About the contents? No.

Q. Were you told anything about the article?

A. Yes, that it dealt with the case.

Q. Were you told anything about whether the article referred to Mr. Masiello at all?

A. I don't remember.

Tr. at 16

Q. Is there anything you knew about the contents of that article from any source whatsoever during sequestration?

A. That night, yes.

Q. What did you know about it?

A. That it dealt -- that that particular article dealt with Mr. Masiello's not appearing in court.

Q. Do you remember where that article -- in which newspaper that article was printed?

A. From what I remember, Mr. Lyon, it was either in the New York Post or the Daily News. I can't place my finger on which exactly.

Q. Can you describe the physical appearance of the article, whether it was a three-column --

A. Yes.

Q. What kind of article?

A. It was a long, thin article.

Q. And were you ever shown articles from the Post and from the News relating to Mr. Masiello's refusal to testify?

MR. SHAW: Is this before or after the verdict?

MR. LYON: After the verdict.

A. Yes.

Q. By whom?

A. By Mr. Barbarino.

Q. Were you also shown such articles by me?

A. Yes, sir....

Q. Well, what did you say with relation to the articles shown you by me? Could you identify them?

A. They were not familiar to me.

Q. They were not familiar?

A. No.

Q. Were you shown articles by anyone else?

A. No, sir.

Q. Didn't Mr. Barbarino show you articles?

A. I stated he did show me, sir.

Q. I am sorry. I forgot that.
Now, how many articles did he show you?

A. Oh, I don't remember. Maybe two or three.
I really don't remember....

Q. What did you say in response to the articles
Mr. Barbarino showed you?

A. That I don't remember seeing them before....

Q. Did you say anything other than that you
don't remember seeing any of them before?

A. That one may be familiar. That any long,
thin article would look familiar to me.

MR. LYON: Your Honor, I want to show the witness
part of the affidavit which is in a Court
file. Perhaps I will use that.

THE COURT: Are you referring to Exhibit A?

MR. LYON: Yes, that's right.

Q. Could you look at that article, at that
exhibit?

MR. LYON: I suggest we ought to identify that
for the record.

THE COURT: Exhibit A of the moving papers.

MR. LYON: Thank you.

Q. Were you shown that article by Mr. Barbarino:

A. I believe so.

Q. And what was your response?

A. That this might have been the article....

Q. Can you tell us what else happened after
Mr. Hutton told you about the article?

A. After he told me about the article, I looked
at it and I said, "Gee, Ed, you better rip it
out," and he proceeded -- I don't remember if

he ripped it out or I ripped it out, but it was ripped out of the paper, and it was flushed down the toilet bowl.

Q. Looking at the article that you hold in your hand, do you see the next-to-the-last paragraph?

A. Yes, sir.

Q. Could you read that next-to-the-last paragraph to yourself?

(Pause.)

Q. I'm sorry, there is no reason to read it to yourself. I will read it aloud: "Sources close to the case said Masiello had declined to testify because he was worried about the consequences his testimony might have on his wife Elizabeth's health."

Did you hear that from anybody during the sequestration?

A. No, sir.

Q. Did you hear that from Mr. Hutton?

A. No, sir.

Q. Did you know from any source at all during the sequestration that Mr. Masiello said he was concerned about his wife's health?

A. No, sir....

Q. Did you tell anybody else that you gleaned that information from a conversation about a newspaper article?

A. No, sir.

Q. You didn't tell that to Mr. Barbarino?

A. About this article?

Q. Not about the particular paragraph, but that you were aware that Mr. Masiello was concerned about his wife's health?

A. Oh, no, sir.

Q. You say you flushed it down the toilet.
Who did that?

A. Oh, I don't recall. It was either
Mr. Hutton or myself.

Q. Could you tell us why you did that?

A. Well, because we knew it wasn't supposed
to be in there. I guess it was just, you
know, a cover-up for -- we either were
covering up for the other jurors not to see
it or a mistake one of the marshals had done,
knowing this article wasn't supposed to be
in the paper.

Q. Did you inquire of any of the other jurors
whether they had seen this article?

A. No....

Q. Did you tell the judge anything about this?

A. No, sir.

Q. At some time during the sequestration, did
you have any further conversations with
anybody about the article?

A. No, sir.

Q. Did you ever discuss it again with Mr. Hutton?

A. The next morning.

Q. What did you do the next morning?

A. We spoke about bringing it to the attention
of one of the marshals.

Q. When you say "we," whom do you mean?

A. Mr. Hutton and myself.

Q. Did you bring it to the attention of one of
the marshals?

A. Yes, sir.

Q. To which marshal did you bring it?

A. Mr. White.

Q. What did you tell him?

A. We told him that last night while Ed Hutton was glancing through the papers, he came across this article that should not have been in there, and that whoever is cutting out the articles from the paper that particular week should be a little more careful, and he said he would take care of it.

Q. The headline of the exhibit I gave you, do you recognize that headline?

A. No, sir.

Q. Now, you said that Mr. Hutton told you about it and then you glanced at it..

Is that correct?

A. Yes, sir.

Q. Would you tell us what portion you glanced at?

A. Just the heading. And then -- Mr. Hutton was sitting down -- if I may explain it -- he was sitting down and he called me into the recreation room that he was in, and he said, "Marie, look what I have found."

I looked at it. But he had the paper in his hand and it was just a glance I took on it.

Q. Were you looking over his shoulder?

A. Yes.

Q. Was Mr. Hutton sitting at a table?

A. Yes, sir.

Q. And he had the paper in front of him?

A. He was sitting in a chair, having the paper in front of him.

Q. Was the paper opened on the table?

A. He didn't have it on the table, sir. He was holding it.

Q. He was holding it then?

A. Yes.

Q. And it was open?

A. Yes.

Q. And you were able to see it over his shoulder?

A. Yes.

Q. How much of it did you see?

A. Mr. Lyon, I would see the heading and, you know, the first paragraph. I didn't even read it.

Tr. at 18-27.

In pertinent part Mr. Hutton testified as follows:

BY MR. LYON:

Q. Mr. Hutton, during the sequestration, the period of sequestration of the jury in the case of United States v. Frank Brasco, did there ever come a time when you discussed a newspaper article with Miss Purpo, an article relating to the Brasco trial?

A. Yes.

Q. When was that, to the best of your recollection?

A. I don't know the date. I know it was around the time that Masiello testified, the stand-in for Masiello, testified.

Q. Masiello testified, you said?

A. The stand-in for Masiello testified.

Q. Where was it?

A. The recreation room at the Skyline.

Q. Can you tell us what time it was?

A. To the best of my recollection, it was 8:30 or 9:00 o'clock in the evening.

Q. Did there come a time when you were holding the article in front of you and Miss Purpo looked over your shoulder?

A. I don't recall.

Q. You don't recall that?

A. No....

MR. LYON: Will your Honor show the witness the exhibit? May we identify it again? That is Exhibit A, I believe, in Mr. Barbarino's affidavit.

Q. Can you tell me, is that the article

A. No, it is not.

Q. Could you describe the article that you saw?

A. The article that I saw, the heading was something to the effect "Stand-in Testifies" -- no, "Stand-in Witness testifies for Masiello, a reputed Mafia. Stand-in testifies for reputed Mafia."

That is not verbatim, but that's to the effect, and I know the word "stand-in" was there. I am pretty sure.

Q. What else did the article say? ...

A. I don't know. I didn't read it.

Q. None of it?

A. No. The only thing is, I was reading the Post -- it was in the Post, I believe, and I got to that point, saw the heading, and it struck me immediately, and then I saw the name John A. Masiello somewhere and that is when I immediately realized it was in connection with the case, so I didn't read any further, I didn't read anything....

Q. Would you look at Exhibit 1 for identification? Would you look at this article and tell us, is that the one?

A. That is the article.

Q. You say that is the article you saw?

A. I believe that is the article, yes.

Q. You believe that is the article you saw that night, and did you show it to Miss Purpo?

A. What I did was, to the best of my recollection, I just pointed out that the marshals had neglected to extract that article, how stupid it was because they were supposed to take out any articles obviously related to the case and beyond that, relating to any crime or political --

Q. I didn't hear the last part.

A. Anything having to do with political trials....

Q. At any time in any shape or form, did you ever show the article to Miss Purpo?

A. I may have held it up and let her see it from a distance and have her glance. I know in my presence she did not read it, unless she read it over my shoulder, which I said I don't recall....

Tr. at 57-60. Later in his testimony, Hutton responded to the following questions:

Q. ... Now, what did the other jurors say, if anything, while you were holding onto the newspaper for 20 minutes?

A. The only thing that I can imagine they would say would be that it was sort of funny that they had left it in there, that it was --

Q. Well, of course, you are imagining. Can you remember what they said?

A. I know that's the way I presented it, and I -- no, I don't remember what they said.

Q. You don't remember what they said?

A. No, I don't remember what they said.

Q. You don't remember whether they said anything at all? Is that correct?

A. That's right. That's correct.

Q. And you don't remember whether any of them said, "Let me see it"?

A. No, I don't remember. No one else read it while it was in my possession unless they read it over my shoulder, me not being able to see them, because I know I intentionally did not read it and obviously I was not going to have someone else read it for the same reason, because we were instructed not to.

Q. You are not sure whether Miss Purpo read it over your shoulder or not, are you?

A. I am not positive. I don't know where she was seated. I don't know if she was in the room....

Tr. at 73-74. Still further on, he stated:

Q. Are you saying you don't know Masiello refused to testify?

A. What I got from the article was I believed I had known that he was not testifying for himself. I didn't know if he had refused or -- you know, I didn't know the circumstances behind it, I just knew he was not testifying for himself because it says a stand-in.

I also believe that this article came after the first day of Masiello's stand-in testifying so that I was familiar that he wasn't going to testify anyway.

Q. You knew that without the article?

A. I knew -- I believe that the article -- I I shouldn't say. I don't know.

Q. You can go ahead with whatever you wanted to say unless you decided you don't want to say it. You started to say you believe something.

A. I started to say that I believe this article came after at least the first day of the stand-in's testimony. Okay, I believe that I saw the article after I had already known that Masiello was not going to testify for himself.

Q. Did you come to -- a point I think you mentioned earlier, that you saw the name John A. Masiello, or the name Masiello in the article.

Q. Do you recall saying that?

A. I recall saying that. And I think I recall seeing that vaguely.

Q. In the article, is that correct?

A. I vaguely recall that, yes, sir, and that is when I stopped....

Q. Will you look at the article, please, and see whether you can find the name Masiello?

A. Yes.

Q. And that is about where?

A. That is about one-third of the way down was the first time I just found it.

Q. And before the name Masiello, do you see a reluctant, something about being a reluctant witness?

A. I saw it there, and I don't see the reluctant witness, no, sir.

Q. Will you go further?

A. Up?

Q. Yes. Up.

A. "Reluctant."

Q. And does that say "A reluctant government informer in the influence peddling trial of Representative Brasco"?

A. Yes, sir. That is what it says.

Q. And that is before the name John Masiello, is that correct?

A. Yes, it is. Could I take one more look at that?

Q. Sure.

A. I want to make sure his name doesn't appear before that.

Q. Certainly. I would like to look for the same reason. Go ahead.

(Pause.)

A. Okay.

Q. At any time after the dummy appeared --
no, I will withdraw that.

Before the stand-in appeared for Masiello,
were you given some instructions by the
Court as to whether or not Mr. Masiello
was going to testify?

A. Before?

Q. Yes.

MR. SHAW: Excuse me, either he was or he
wasn't.

Does this witness' present recollection of
that fact have any relevance?

I object.

THE COURT: I don't know the point. There is
something in the affidavit about somebody
saying the judge said something about it.

I have no present recollection of saying
anything about it, but I don't know.

Do you recall that?

A. I don't recall either, no, sir.

Q. When the stand-in witness appeared, you
knew who the stand-in witness was, didn't
you?

A. At that time?

Q. Yes.

A. I think he was -- I don't remember.

I think he was announced as a -- I don't
know -- no, I don't know. No, I don't.

Q. You didn't know whether he was employed by
anybody or --

- A. I know now that he was employed by -- I think he was in the Justice Department, and I believe --

Tr. at 82-85.

Jurors Hall (Tr. at 103-04), Fine (Tr. at 123), Lazarou (Tr. at 269-70), and Aponte (The Court was unable to secure the appearance of Mr. Aponte during the hearing on this motion, however, Mr. Aponte was subsequently interviewed by telephone on October 22, 1974 at approximately 6:00 P.M. and was questioned at that time by my law clerk, Mr. Kaplan, in the presence of my other law clerk, Mr. Danilow. In response to Mr. Kaplan's questioning, Mr. Aponte stated that he was unaware of the involved article.)

Jurors Chiang (Tr. at 96-97), Benjamin (Tr. at 106-07), Rivera (Tr. at 113-14), Robbins (Tr. at 264-65), Rambach (Tr. at 271-73), and Anderson (Mrs. Anderson was in Iowa at the time of the hearing on this motion. She was interviewed by the Court, by telephone, during the course of the hearing. Tr. at 335-37. Subsequently, she wrote in a letter of October 21, 1974, as follows: "In reference to our phone conversation earlier today, I wish to further explain my reactions regarding the article Mr. Ed Sutton [sic] removed from the newspaper concerning the trial. I did not personally view the clipping. Instead, I was told that the article had been thrown away, and the contents of the clipping were not revealed or discussed with me at any time. Therefore, it failed to influence my decision on the case in any way.").

Messrs. Lyon and Erlbaum and Miss Romaner testified in substance that during an interview with Miss Puŕpo which was conducted in Mr. Lyon's apartment, the juror stated that the article which she had seen during the sequestration related,

to the fact that he didn't want to testify, and she recalled that he was concerned for his -- for the life of his wife, in words or substance -- I don't remember the exact words -- and she wasn't sure -- she said

definitely she had not read the whole article. She wasn't sure whether she had only read the first paragraph, but she knew that she had read just enough of it not to read any further, she said; but that much she read. And she also said that Ed Hutton had read more -- that Ed Hutton, as a matter of fact, was the one who showed her the article.

Tr. at 325.

Or as the statement of Miss Purpo was later summarized by Mr. Lyon in response to a question by Mr. Shaw:

Q. Mr. Lyon, your testimony here today, as I understand it, is that on two occasions on that evening when Miss Purpo was at your home, she stated directly to you or directly within your earshot that an article she had seen during the course of the trial contained in it a statement that the reason Masiello did not testify was that he was afraid for his wife's safety. Is that right?

A. Well, she didn't state it that succinctly. She stated it exactly the way I stated it: That there was an article which had something to do with the fact that Masiello didn't testify and had some discussion about the fact -- and I am talking words or substance -- some discussion about the fact that he was afraid for his wife's life. She did not state it in the precise lawyer-like language that you are using now.

Tr. at 328-29.

At best, the statements of Miss Purpo on the occasion of her interview in Mr. Lyon's apartment are somewhat inconsistent with those made by her under oath, and thus may be considered as bearing upon her credibility as a witness. However, they are not such as would render her in court, under oath, testimony unworthy of belief or allow the Court to infer any prejudice on her part against the defendant.

PETITIONER'S # 1

A Stand-In Testifies for Mob Figure

NEW YORK POST, TUESDAY, JULY 22, 1974

The "witness" appeared impassive on the stand, looking neither at the jury nor at the man he was accusing. His eyes never shifted from the sheets of paper in front of him; his voice was a steady monotone, with no hint of anxiety.

"Is this your signature?" the prosecutor asked sternly.

He did not look at the exhibit held before him.

"Yes, it is," he said, with no expression.

It was not his signature, however, and everyone in the courtroom, including the judge, the jury and the man on trial, knew it. The man giving testimony was a "dummy witness," standing in for a reluctant government informer in the influence-peddling trial of Rep. Frank J. Brasco.

Yesterday, as the Brooklyn Democrat's second trial continued in federal court, reputed mobster John A. (Gentleman John) Masiello, who has refused to testify despite an offer of immunity, was replaced by a court aide who read from the record of Brasco's first trial.

No 'Gestures or Inflections'

He was instructed by Judge John M. Cannella to "employ no gestures or inflections" in reading the court record. As the prosecutor, U. S. Attorney Edward M. Shaw read the questions he had aimed at Masiello during Brasco's first trial—which ended in a hung jury in February—the dummy witness responded, often stumbling over unfamiliar names and occasionally failing to respond completely.

Masiello, who is serving a seven-year term at the Federal Prison Farm in Allenwood, Pa., was the most damaging witness in Brasco's first trial, where he testified after a promise of immunity from the court.

But he refused to testify last week, saying he felt his appearance on the stand would endanger the life of his wife, who has recently been ill.

Judge Cannella assured the jury yesterday that a reading of Masiello's original testimony was "proper evidence" since the new case was based on identical charges.

Nothing Unusual . . .

In the testimony read yesterday, Masiello claimed that Brasco, then a member of the House Postoffice Committee, obtained Postal Service trucking contracts for him in return for a \$10,000 bribe paid to Brasco's uncle, Joseph. The contracts were terminated after Manhattan postal officials learned of Masiello's reputed affiliation with the Vito Genovese crime family.

The defense contends Brasco did no more to aid Masiello than he would have done for any constituent who came to him for help, and that no bribe was ever paid.

PETITIONER'S # 2

Brasco's Defense Continues

Rep. Frank J. Brasco's attorney will continue presenting his client's side of the case today as the Brooklyn Democrat's retrial on bribery-conspiracy charges moves into its 13th day in Federal Court.

Defense attorney Herbert Lyon said he will probably call "some of Brasco's former law partners" today to deal with "substantive parts" of the prosecution's case.

Lyon yesterday began Brasco's defense after the prosecution rested its case.

The prosecutor spent most of yesterday reading previous testimony from the government's chief witness from the first trial.

The witness, reputed mob leader John A. (Gentleman John) Masiello had refused to testify at the present retrial, after testifying at the first trial.

The first trial ended in a hung jury in March.

Brasco, 41, is accused of conspiring to obtain \$27,500 in illegal payments from Masiello in return for his help in obtaining postal contracts to haul mail. Brasco was first elected to Congress in 1966.

The Justice Dept. has described the 54-year-old Masiello as a captain in the Vito Genovese's Mafia family.

A highlight of Masiello's testimony concerned giving Joseph Brasco, 72, the congressman's uncle, \$10,000, allegedly for assistance in obtaining the contracts.

The elder Brasco had been indicted with his nephew. His trial was severed after he fell ill.

Sources close to the case said Masiello had declined to testify because he was worried about the consequences his testimony might have on his wife Elizabeth's health.

She was reportedly upset about stories the mob had taken out a contract on her husband's life because of his cooperation with the government.

PETITIONER'S # 3

Silence of Key Witness Delays Brasco's Trial

By MARVIN SMILON

The bribery-conspiracy trial of Rep. Frank J. Brasco was recessed for the weekend early today to give the chief government witness, reputed mob leader John A. (Gentleman John) Masiello, one more chance to reconsider his refusal to testify.

After a private conference in the chambers of Federal Judge John M. Cannella, the sequestered jury was told once again that the government had no witnesses ready but hoped to proceed on Monday.

The hope is that before Monday, Masiello's lawyer Patrick M. W. P. will have talked him into avoiding a criminal contempt of court charge by testifying.

Yesterday, Cannella warned Masiello that he would cite him after he refused to answer questions put to him by Edward M. Shaw, chief of the Joint Strike Force Against Organized Crime.

Masiello, a key government witness in the case against the Brooklyn Democratic Congressman, testified last February in the first trial which ended in a hung jury the following month.

If he maintains his position, it will deal a severe blow to the prosecution's case but it is expected they will seek to send him to prison from the first trial to the next trial.

Masiello, 51, has been described by the Justice Dept. as a captain in the crime

family headed by the late Vito Genovese and is probably the highest ranking Mafia leader ever to testify for the prosecution.

While he did not give any reason for declining to testify, it was learned from sources familiar with the case that Masiello took this step because he feared the consequences his testimony would have on his wife Elizabeth's health.

She has had serious emotional and physical ailments recently which reportedly were exacerbated by the notoriety growing out of his testimony in the last Brasco trial. She was reportedly particularly upset by the stories that the mob had put out a contract on his life because of his cooperation with the government.

After the jury left the courtroom today, Brasco's attorney, Herbert A. Lyon, rose and asked to spell out the circumstances of the recess for the record. He added, "We want to make it very clear that Mr. Masiello has expressed no fear of anything connected with us."

Masiello's continued refusal to testify could result in a contempt trial before Cannella, who is empowered to impose a maximum prison term.

Brasco, 41, first elected to Congress in 1966, is accused of conspiring to obtain \$27,500 in illegal payments from Masiello in return for his help in obtaining postal contracts for the Post Office.

Joseph P. ... the Congress ... was

also named in the indictment, but his case was severed during the first trial when he fell ill.

The government alleges that \$10,000 of the money was paid by Masiello for the politician's aid in getting the mail hauling contract for A. N. R. Leasing Corp., a trucking company he headed.

Another \$17,500 was promised for help in gaining a \$75,000 loan to pay for the trucks needed to fulfill the contract.

Masiello, who had been granted immunity earlier, was called to the witness stand in the second week of the trial, with the jury absent from the courtroom because he had indicated he would refuse to testify.

Shaw asked him some preliminary questions and he replied, "refuse to answer." He remained adamant even after being directed to answer by Judge Cannella who then held him in civil contempt.

That act, however, was purely symbolic since Masiello is already in federal custody serving a total of seven years in sentences for half-a-dozen different crimes including bribery, extortion, bankruptcy fraud and tax charges. He has already served two-and-a-half years.

Masiello testified in the first trial that he passed \$20,000 in cash to Joseph Brasco as a payoff for the help the Congressman purportedly provided in obtaining the postal contracts.

NEW YORK POST, FRIDAY, JUNE 28, 1974

CRIMINAL

TRIAL COURT'S CHARGE

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1 makes any requests. Everything will go through him.

2 MR. SHAW: He or she, your Honor.

3 THE COURT: That's the editorial "he" the one
4 used before liberation. He will then have the powers of the
5 foreman.
6

7 You will notice that I have a diagram up here
8 behind me. I wonder whether you can see it. I know it
9 makes no sense to you at this time, but there is a school
0 board here behind me.

1 Can you see it? Let's bring it up to a point
2 where everyone can see it.

3 (Pause.)

4 THE COURT: This, undoubtedly, makes no sense to
5 you. There are a lot of symbols on there. The reason
6 I have that up there is because I know that very few
7 of you have had any contact with law at all, and I know
8 that some of these terms and some of these concepts are
9 not easy to come by.

For that reason I put up this skeleton outline of
the charge so that at any particular point in time, if you
glance at it, you will see I am in a certain area.

For example, I may be in the area of where it
say "Evidence," about four lines down, where it says
"Quantitative and Qualitative"; and then you will notice

1 pgr 16

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2 that we are talking about evidence at that point.

3 The next phase says "Not evidence," and right below
4 it it says "Evaluating evidence." At any point in time during
5 the charge I may refer to that, so you will know what part
6 of the charge we are in. That's all it is. It is a skeleton
7 outline.

8 At the outset, although I perfunctorily thank
9 jurors for their service, this is an unusual service that
10 you entered into, and I do really thank you for the careful
11 attention you have paid to this case. There were times when,
12 frankly, I had very much trouble trying to keep awake, but
13 every time that I glanced at you, you gave me courage because
14 most of you were awake. I appreciate that fact because
15 I know it gets very dreary, especially in an area in which
16 you have no had any particular contact.

17 I want to thank the lawyers too. If it were not
18 for the lawyers there would not be judges, but, in any event,
19 these lawyers have been particularly helpful to the Court
20 and they have focused your attention to the very critical
21 areas in this case. They have helped me also in the area
22 of the law when we were discussing the matters at the side
23 bar, and, therefore, I thank Mr. Shaw and Miss Jones, and also
24 Mr. Lyon and Mr. Wender.

25 You will see the first line that I have up there.

pgbr 17

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It says "Facts."

Well, some of the facts are agreed. That's the
A that is up there.

As to a lot of the facts there is disagreement.
It is not just disagreement in the sense, you know, they
are a little bit off on it. They are at collision:
course. They are in juxtaposition in these areas. There
isn't any two ways about these particular areas.

One that comes to mind immediately is that whether
there were those meetings that the government witnesses
testified to. There is no agreement between the parties
in this area whatsoever. Brasco flatly denies there were
any of those meetings.

It is because of those areas of disagreement that
questions of fact have arisen in this case. Questions of
fact are the sole and sovereign province of the jury. You,
you are the sole judges of what the facts are in this case.
You are the sole judges of the credibility of each and every
witness that has appeared in this case. You are the sole
judges of how much weight you will give to the exhibits
that are in the case and how they are interpreted. This is
your job, just the same as if you were wearing a robe, as I
am.

Questions of law you must accept from the Court

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and apply it to the facts as you see them. You have no choice in that area.

In this particular case we start with a grand jury indictment. That's what started this proceeding, and this is the usual way for a criminal proceeding to start in the federal court.

The grand jury didn't hear any of the defense witnesses or positions or contentions. They only heard the government witnesses. They wound up with a document which is called a true bill or an indictment, which is simply an accusation. It is not evidence of anything except that the grand jury acted.

The defendant Brasco came to court after that indictment was filed and pleaded not guilty. By his plea of not guilty, he put the government to its proof as to every material fact that appears in that document. He put the case in issue.

Now we are only involved at this point, although the indictment mentions more than one defendant, with this defendant.

The fact that there was a prior trial in this case does not help you in any fashion whatsoever with deciding the facts. You can just as well forget about the prior trial, that there was such a trial, and the only

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relevance it has is during that trial certain statements were made under oath, and you have been made aware of those statements, and you will use them in the fashion which I will indicate to you later.

I took a position in this case because of the illness of Mr. Joseph Brasco to sever the case against him, the uncle. That was a judgment made by me as a matter of law. It has nothing whatsoever to do with the facts. Therefore, it should not enter into your discussions as to why he is not here or why he should be here, or anything else. It has nothing to do with your function. I decided that as a matter of law.

As a matter of logic, and also as a matter of law, one that makes a statement, an assertion, is the one that should have to prove it. The government has that burden of proof in this case. That is more so because in every criminal case the defendant under our jurisprudence is presumed innocent and he is presumed innocent throughout the trial. He is presumed innocent even now while I am talking to you. He is presumed innocent even when you go into the jury room and start to discuss the case and do discuss the case. That presumption remains with him unless and until the government proves his guilt to your satisfaction by credible evidence beyond a reasonable

doubt.

You see it up there. G is for Government.

The government has the burden of proving the defendant guilty by credible evidence beyond a reasonable doubt.

That's the stage we have reached at this point.

What do we mean by evidence? Evidence is the tool used by both sides when they want to prove something: They produce evidence. The first way in which evidence can be discussed is its nature, qualitatively. That means, in this context, credible evidence.

I will try, from time to time, as we get along with these terms, to break them down into language which you can understand, because legislators and lawyers sometimes talk in what I believe laymen feel is gobbledygook and they don't know what they are talking about.

I will try, when we come to any term of that nature, to explain it better to you so you can understand it as a lay person.

This particular word "credible" is derived from the Latin "credere," which means, I believe, the kind, the quality, of the evidence must be believable, something you will believe.

The quantity of the evidence, the amount of the evidence, the evidence necessary before you may convict the

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defendant, must be beyond a reasonable doubt. I will define that term to you. It has nothing that is very, very odd or mysterious about it. It defines itself for all purposes. A "reasonable doubt" means a doubt that is based on reason and must be a substantial doubt rather than a speculative doubt. It must be such a doubt that would be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life. This is the kind of doubt that is required in this case, and before you may convict a defendant it must be beyond a reasonable doubt.

Evidence is also described in that second paragraph there in various categories. The first is testimony. That is where a witness comes here, takes the stand, takes an oath, and tells you what he has learned by the use of his senses.

Sometimes some witnesses are allowed to give opinions; generally they are not. You are the one that forms the opinion after you listen to it.

It includes any natural inferences that flow from that testimony. It includes anything that is brought out on cross examination of that witness, on redirect examination of that witness, on recross examination of that witness. Anything that that witness has said under oath

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you must consider.

The second kind of evidence is called exhibits. Exhibits in evidence has reached past the 100 number as far as the government is concerned. There are at least 100 exhibits. The defendant is in double or triple letters. I don't know what stage they have reached. Every exhibit in this case that was marked into evidence is part of the case and must be considered by you. Those exhibits which were not marked in evidence but which were just marked for identification may not be considered by you, and you may not speculate upon what could be in that exhibit. It has not been allowed and you may not speculate.

Some of the exhibits have been marked for a special purpose. The one that comes to mind is the letter agreement. I allowed it to let you understand what Weiner's frame of mind was, but I did not allow it because he could not prove that it was mailed, that the person who was supposed to get it that actually got it; it was not allowed for that purpose. You may consider that exhibit with the condition upon which it has been received.

The next kind of evidence is stipulations. That's simply agreements between the parties, and whenever Mr. Lyon and Mr. Shaw agreed upon anything that is part of the case and you will consider it as evidence in the case.

The next item is J.N., and that means Judicial Notice. There are some things that are so evident to everybody that there is no need to prove them.

In this case, for example, I take judicial notice that the office of the defendant is in Manhattan, and that's in the Southern District of New York. It is in one of the counties in which we operate.

I take judicial notice that the home that was described in the case here in Brooklyn is in the Eastern District. It is not in our district.

I take judicial notice that the Capitol is in the District of Columbia.

As Mr. Lyon said, this proceeding could have been brought in any one of these districts because being a conspiracy you can bring it in any district where the conspiracy is supposed to happen.

I find in this case, and I tell you I take judicial notice, that the Manhattan office and certain other locations named in the Bronx and elsewhere are within the confines of this district and, therefore, you have a right to hear this case.

What "other" on that line means, various things which you must consider is evidence. The first that comes to mind is the grand jury testimony when it was referred

1
2 to.

3 I might say -- and I said it during the trial --
4 that when the lawyers referred to any of these things
5 they never put in the record, except at the very end, that
6 these remarks, in fact, existed as they read them, but that
7 has been agreed that that's the case. Whenever they read
8 anything that they said was from the grand jury or the
9 previous trial, or anything else like that, they have
10 agreed, and that's a stipulation they entered into, that that,
11 in fact, appeared in that document that they were referring
12 to.

13 We also have a statement to Mr. Beall and a
14 transcript taken from a tape. We have an FBI statement.
15 We have some of the court proceedings in a bankruptcy
16 case, I believe it was.

17 Any of those items which I have mentioned to you
18 are evidence in the case and must be considered by you.

19 You will notice the next line is "D and C".
20 That means direct evidence and circumstantial evidence."

21 Some laymen have an idea that in order to prove
22 something you have to have direct evidence and nothing else
23 is worth anything; circumstantial evidence is really sus-
24 pect. That is not so. In the first place, let me define
25 these terms to you so you know what we are talking about.

Direct evidence is evidence which is received by a person who comes here and testifies and tells you what they have seen, what they have heard, and so forth.

Circumstantial evidence, on the other hand, is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to the conclusion that those facts exist which are sought to be established.

The law does not make any distinction between direct and circumstantial evidence. It simply is this: You must be convinced after you have heard all the evidence, direct and circumstantial, a combination of both -- whatever it is -- of the defendant's guilt beyond a reasonable doubt before you may convict him. It makes no difference what kind of evidence it is, direct or circumstantial, or a combination of both.

What about this question of circumstantial evidence? How does it enter into this case?

A lot of this case concerns trying to find out what the mental attitude and what the mental processes of the particular person involved were at the time that they

were happening.

As a matter of fact, the nub of this case actually is: Did the defendant Brasco act corruptly in his conduct during the course of these events or did he not? That involves a mental operation. You cannot see a mental operation. You can only determine what is happening in a man's head by determining and looking at him and seeing what he is doing, how he is doing it, who he is doing it with, and then coming to a conclusion as to what happened.

Circumstantial evidence sometimes requires descriptions that are of some help to you.

We can take an example from Christianity. Christ, in explaining things, very rarely gave an answer. He told a story. A fellow said, "Is it right to work on Sunday?"

He could have simply said yes or no. He didn't say that. He said, "If your ox falls into a pit on a Sunday, are you going to leave it there to die?" That was the Socratic method. You answer a question by a question and have the person learn it by himself.

Actually, I am going to pull that ox out of there or he will die.

As we go along here I will tell you some of these things, and in this particular area, the circumstantial

area, I will tell you a few examples of how it works and how you use it every day. You use circumstantial evidence every day in the week.

A mother has two children. One is about two years and the other is six or seven. She tells them they are not to eat between meals. She goes out and does gardening. The two kids are in the kitchen. She comes back and she sees that the jelly jar is out on the table; it was in the closet. She looks at them, and one kid has jam all over his face and on his hands and the other kid is perfectly clean. She knew this jar was up in the closet when she went out, so she says, "Who took the jar down?"

Well, she looks down and she is trying to make up her mind, "How did this happen?"

Well, she knows that the one little guy, he has the jam all over him. He, she knows, finally got into it, but did he get into the closet? The shelf is up six or seven feet. The little fellow couldn't get up there. They have one of those little ladders you have in the kitchen.

The mother looks at the other boy and says, "Did you get the jar?"

He looks down and doesn't answer. Does she know who took the jar? Does she know who took it down? She didn't

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see it, but just as sure as you are sitting here she knows that the bigger one of the two of them got up on the ladder, got the jelly, brought it down, and the other little guy helped himself. There is no direct evidence in this case whatsoever.

What about circumstantial evidence? How do you know that there is enough of it, or sufficient circumstantial evidence, to assist you in coming to a judgment?

A Roman father at the time of his dying said, "I want to teach you a lesson before I go. Give me some of those twigs."

And he took some twigs, took one of them, and broke it. He took two of them and put them together and broke that easily. He got up to four or five and he was having trouble. Finally he got up to a point where he couldn't break any more.

So he turned to the sons and his lesson to his sons, which is not the lesson we are getting here, was "Stick together and nobody can take advantage of you."

The lesson we learn is: When do we reach the point when circumstantial evidence is so strong to convince you beyond a reasonable doubt? That's a judgment you must make.

Mr. Shaw, to use a religious term, sang a "litany"

of all the circumstantial evidence, the documents, Cook, Nobles -- well, you will have to look into all those elements and you will have to determine yourself whether this particular element has been satisfied, where you have reached the point where the sticks don't break, where you reach the point where it convinces you, that's a judgment for you to make.

Now we come down to the point here where it says "Not evidence." It is always important to know in deciding something what you should exclude, because if you know you have to exclude these things, then you can more easily decide what you have to decide with what is left.

The indictment is not evidence. I have already explained to you what it is. It is only an accusation.

I explained this to you during the course of the trial, and I am sure you remember it: The facts that are in a question are not evidence unless they are developed during the course of the trial. The asking of a question does not establish that as a fact simply because it is stated in the question. Keep that in mind.

Matters which were stricken. The witness blurted out an answer and one I used an example -- it is kind of silly, the jury is going to remember it anyhow, but you are not supposed to remember it, you are supposed to strike it out

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2 of your mind. You will do that as best as you can.

3 Comments of the lawyers and of the Judge, we were
4 not sworn in this case; we didn't give any evidence at all.
5 It sounded sometimes like we were, but I warn you now that
6 unless you heard it during the testimony in the case, what
7 the lawyers say about something is not evidence whatsoever.
8 The argument they make, if it is based upon facts that you
9 find, you may adopt, but you never can adopt what they say
10 is a fact unless you, yourself, find it as a fact.

11 You must find it yourself because they were not sworn and
12 the Court was not sworn.

13 The next area contains a lot of numbers that appear
14 under "Evaluation of Evidence". That's exactly what these
15 particular items are concerned with: The evaluation of
16 evidence.

17 The first one that I call to your attention is
18 something we do as a matter of common sense. There is not
19 anybody that doesn't use these particular norms in one
20 fashion or another: The demeanor of the witness.

1 When a witness gets on the stand, how does he act?
2 How does he respond? Even his physical appearance
3 as he talks, does it change? Does he ask questions in order
4 to borrow time? Does he sit back relaxed and give his
5 answers, which you feel are freely given, or does he fence

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in trying to figure out, instead of what he is answering, what the lawyer is up to? All these various things come into consideration.

When the Fuller Brushman comes to the door and shows you a brush, you look at him and look at the brush and size him up. Then you say to yourself, "Well, I think that was a good product and it sounds good. This is the same kind of judgment you make in matters of importance to you in your daily life.

Use that same kind of common sense because the law does not require you to leave your common sense outside the jury room. That's the second element there, that "CS." You are to bring that in the jury room with you and exercise it to the fullest. Use your common sense.

The next is the interest of witnesses and of the defendant. He testified in this case. You remember, I told you there was no obligation on the defendant to testify. There is no obligation on the defendant to produce witnesses. He may remain mute. The burden of proof is continually on the government throughout the trial and never shifts to the defendant. There is no need for the defendant to prove his innocence. That's the French system. We don't adopt the French system. Here the man is presumed innocent, so that in this particular area he

need not do any of these things. Of course, he chose to take the stand and he chose to produce evidence, and when he does that he becomes the same as any other witness. He has no special privileges. He has no greater obligations. He is a witness just like anybody else.

But when you determine his interest, of course, this is important.

Let's just look into the groups of people that testified in this case and how does this particular point of interest apply to them?

Let's start with the character people because they were of greater number and they covered all kinds of walks of life. There were judges, teachers, there was a priest, there was a public official in the post office, there was a doctor, there was a gasoline operator, a housewife, four Congressmen, Koch, Gray, Abzug, and Murphy.

As I told you, when their testimony came in, you don't expect a defendant to bring in people who were not his friends. There is no reason he should not. The mere fact that a man is a friend of yours does not mean to say that he will lie for you.

On the other hand, there is not any question that some of these people knew him for 15 years, some of them knew him ten years, and some of them knew him in church.

1 So considering the background and what experience
2 these people had with the defendant, you can determine
3 how much weight you are going to give to that evidence.
4

5 You take Mrs. Sullivan, for example. She didn't
6 know him in any community, not her own community or his
7 community. She was unable to testify about his reputation
8 in those areas, but she did know him amongst the people in
9 the post office who were employed with her husband, and
10 various affairs that they went to.

1 MR. LYON: Excuse me, your Honor. You mean
2 Mrs. Sullivan concerning Doherty.

3 THE COURT: Not Brasco.

4 The same kind of principle applies to both evidence
5 which is for bad reputation as well as for good. You have to
6 depend on: How do they know this? What foundation do
7 they have for this? He knows him nine months and sees him
8 three months, and sees him at a social affair. You
9 gauge the testimony according to their background.

10 I will discuss character testimony later, so I
11 won't go any further than that.

12 The witnesses for the government, Doherty, Weiner --
13 these two fellows, of course, were involved in this
14 particular activity here. You know their background.
15 You know their interests. You know that Masiello, for

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example, got immunity. You know that Doherty was named as a co-defendant but was not named as a defendant. You know that Weiner is also in the same position and so, considering the motivation they may have, and so forth, you will determine how far you will believe them.

Also, in regard to some of these, I will go into it further later on when I discuss, and you will see, some other -- for example, No. 11, perjury and so forth. I will go into it further on when we get to those areas, but, generally, what we are saying about witnesses is that you look into their background, their interest, their position on the case, and make a determination.

You have the FBI men, of course, Sullivan and Hutchison, and you have the man from the liquor store, Kagan. You have Schore and Salvan. They were the CPA and the attorney for Masiello. You can go on and on.

Then there was Brasco, of course, and his wife. Then he brought in his office people, Metzner and Caradi and Kilroy. They are, of course, employed by him, and here, again, it does not mean that because you work for somebody you are going to like him; that does not necessarily follow. But, in any event, you know there is some interest in protecting the boss' reputation and their own because it could only be natural that that be so. Cardone, of course,

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was his partner, but I don't remember whether Mr. Cardone was asked about his reputation. I don't think he was. He testified as a witness.

So, generally, what we mean by "interest" is that you look into the background of a particular person that you are discussing at the time and what influence could that have on his testimony. You make a judgment as you would in your ordinary activities of life.

The defendant, of course, has a great interest in this case too because if he should be found guilty he may go to jail, he may be fined, he maybe punished.

He will be punished, but the form of it is such that nobody can tell you at this point because that does not concern you at all or the facts. What the punishment can be in this case you are not to discuss. It has nothing to do with your deliberations. It can't help you find where the truth is. It has nothing to do with it. This is something that happens later on, and it is the function of the Court and not your function.

I now come to PTF. That's No. 4. That means that if a witness has falsely testified to a material fact in this case you must disregard the portion which is false and you may disregard his entire testimony. Here, again, so that you may understand it, I will you a little

"parable" -- if you may call it that. It is one that would be understandable to women rather than to men.

If you make an omelet, say, with three or four eggs, and you don't do it the way you should -- which I happen to know -- in other words, if you put them all in at one time and it happens that one of those eggs is bad, well, when you start to cook that you are going to smell it. You throw it away.

That's material false testimony. You may not consider it. That's out.

On the other hand, if you are making some toast and you burn it a little, you just scrape off the part that is burnt. You don't eat it. You give it to your husband. But you don't throw it away. That's the part you may use during the course of the case.

Now we come to an accomplice. Well, an accomplice is one who assists or unites with another person, or persons, in the commission of a crime. He does this voluntarily and he does it with a criminal intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be sufficient to sustain a verdict of guilty, even though it is not corroborated or supported by other evidence.

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However, you should keep in mind that such testimony is always to be received with care and weighed with great caution. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that the unsupported evidence beyond a reasonable doubt satisfies you that he is guilty.

In this case we don't have that proposition because the government's contention is that not only is there the testimony of the accomplices, mainly, Doherty, Masiello, and Weiner, but also this testimony has been corroborated by other testimony both in the nature of witnesses and in the nature of documents, and earlier I referred to that part of Mr. Shaw's argument as a litany. You remember? He mentioned Coffman, Cook, Nobles, and others, and then he indicated documents to you. That's what we are talking about, so that that is the law concerning how you treat the accomplice testimony.

The next item is No. 6, Reputation. I already told you about this when we started to talk about these witnesses. If you remember, when Congressman Koch was here I explained to you the law concerning how this operates. Evidence of good reputation may in itself create a reasonable doubt where without such evidence there would be no reasonable doubt. However, if from all the evidence you are

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satisfied that the defendant here is guilty, a showing that he previously enjoyed a good reputation for truth, veracity, and honesty, there is no excuse, and there is no defense, and you should not acquit him merely because you believe that he was a person of good repute in these respects.

But you must consider that evidence together with all the other evidence in coming to a judgment on this. It is important for you to understand that that is a fact that must be discussed by you.

The next item is PIS, No. 7, prior inconsistent statements. This is all in evaluating the evidence, how you evaluate the evidence. That's what we are talking about.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. These earlier contradictory statements are admissible only to impeach his credibility and not to establish the truth of the statement. It is your province to determine the credibility to be given the testimony of a witness who has so been impeached. This concerns that area where, for example, wherever you find it during the course of testimony use the same norm.

When Mr. Brasco was questioned by the FBI agents

he made certain statements. If you find those statements to be false then, of course, you will consider that. In other words, here, if you find that he said one thing and to the FBI he said another thing, that's an inconsistent statement with what he said here, and therefore, if you believe that it was done wilfully, not through mistake or because he was just giving his best judgment or because he was not thinking well at the time -- but it has to have some element of trying to fool the FBI, it is just not a simple mistake -- if you find he made such a statement, then you could consider whether or not it impeaches his testimony. That applies to any other witness who is confronted by previous testimony.

Mr. Lyon has used the bankruptcy proceedings with Weiner, and there are other times when this thing happened, but wherever you find that there is a prior inconsistent statement you may use it in that fashion.

Bad reputation I have already covered. That's the other side of good reputation. The rules are the same. You may consider whether or not a man has a bad reputation, and if you are satisfied that he has, then we will consider his testimony in the light of that bad reputation.

We then come to convictions. Some of the people in this case have been convicted of crimes. Masiello was

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convicted of many crimes. He is in jail doing a lot of time on some of these crimes.

By the way, while I think of Masiello, remember that first subdivision I had there: Demeanor. Naturally, Masiello didn't come here so you didn't observe his demeanor. What you did was hear a transcript of what he said at the other trial, so you don't have the benefit of that in determining whether he is telling the truth in this trial. You didn't really see him. You could not have observed his demeanor. You should consider his testimony, nonetheless, because it is part of the record.

We are talking now about, how do you use the fact that a man has been convicted of a crime in evaluating his testimony? The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony. A felony is a crime which is punishable by a term of imprisonment of years. The conviction does not render the witness incompetent to testify, but it is a circumstance which you must consider in determining the credibility of that witness. It is entirely within your province to determine the weight to be given to any conviction as impeachment. That simply means that you analyze what he was convicted of.

A man is convicted of an assault, for example,

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a serious assault, and was sent away for a felony. Does that really enter into whether he can tell the truth or not? Is that the kind of thing that could help you?

On the other hand, he cheats on his income tax, fools the government. What about that? What kind of a crime is that? How does that affect his credibility?

Well, you are getting closer, but you take a fellow that commits perjury, for example; there you are in an area which is quite close to the very critical judgment you are going to make. So you will consider the fellow in this case -- I don't think there was actually anybody that was convicted of perjury, but there are people who were admitted perjurers to the effect that they did commit the act.

Weiner, three times on his license or some other area, perjured himself, and Masiello, when he went to get that divorce proceeding, he made a false statement about his residence, and so forth. Well, the point is that these are the kind of areas which could help you, I believe, in trying to determine how much you believe a person other than a fellow convicted of assault. Keep in mind the particular area that the fellow was involved in, and if you find that it helps you in determining his credibility you will use it. It is your obligation to consider it.

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The same rule applies to the one I just passed, bad reputation. You will consider that in determining how much of his testimony you will believe. You will remember that there are witnesses that testified as to the bad reputation of Doherty and Weiner; his cousin testified as to his bad reputation, and the lawyer -- I don't remember his name -- he also testified to his bad reputation. You will remember that and apply that rule in evaluating that testimony.

Now we get to the point here of false exculpatory statements. Evidence has been introduced that the defendant made certain exculpatory statements outside of the courtroom to the FBI, for example, with regard to ANR: His knowing Weiner and his interest in the little man involved with ANR. Evidence contradicting such statement has also been introduced.

The defendant has also denied any of those three meetings that were testified to in this case. If you find that the exculpatory statements were untrue and that, in fact, the meetings did occur -- which the defendant denies -- and that he made these denials voluntarily with a knowledge of their falsity, you may consider this as circumstantial evidence of the defendant's consciousness of guilty.

You may feel, well, he doesn't want to admit those

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meetings because if he does, he is "a dead duck" -- to use the vernacular -- and he is probably doing it for that reason.

That's not the only conclusion that is to be drawn, but you certainly have a right if you find as I have indicated in this area that this was done voluntarily and falsely, to consider that that shows on the defendant's part a consciousness of guilt.

The next element we have is perjury. I have already covered that. The testimony of an admitted perjurer should always be considered with great care and weighed with caution. I have already told you Weiner admitted he made false statements with respect to licenses, and Masiello admitted false swearing in Nevada.

This is not to say that these witnesses testified falsely here. You are going to make that judgment, and I use the words "great care and caution" to show you and advise you in what manner you should do that.

Now we have reached the end. This is really only an aside at this point. We know that the defendant is a Congressman. We know he is a lawyer. There is nothing wrong about being a Congressman and a lawyer at the same time, and there is no reason why he cannot practice law if he wants to. I don't think he does that now.

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He dabbled a little bit before, but, in any event, if he did he has a right to do it. He has a right to exercise his license, and the mere fact that he is doing so does not in any way reflect upon his guilt or innocence in this case.

Also, when the FBI men came to talk to him and told him his rights under the Miranda case, which is the one that started this business about giving rights, he said, "Who sent you? Beall? I want to talk to Beall or Skolnik."

They said, "Give us a statement."

He said, "I would rather not."

So, in any event, he finally gave them a statement, and when they wanted him to sign it and swear to it he said he didn't want to sign it and swear to it. There is no obligation on his part to sign it or swear to it at all. He had the right to refuse to sign it. He had the right to refuse to swear to it. That's the very reason why they tell you the warning. If they give you a warning and then you have no rights, that would be silly.

If they say to you, "You don't have to talk," and they say, "You have to talk and sign this and swear to it," there is no such obligation on his part.

He didn't have to sign that statement to swear to

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it.

Now we come down to a point where we are talking about definition of terms. There are three letters there: UKW. That means unlawful, knowing, and wilful.

The reason I am defining these terms is so you will understand the charge in the indictment. The indictment uses each of these terms. Don't worry about the indictment because you are going to get a copy of it and you will be able to examine it in the jury room. But almost the first few words that appear in the indictment are that the defendant acted unlawfully, wilfully, and knowingly. What does that mean?

"Unlawfully" means against the law, and the particular law we are talking about in this case is the federal law. That's what we are talking about.

"Knowingly" -- to do an act knowingly means that you were doing it voluntarily and freely, and you are not doing it through mistake, inadvertence, or in good faith.

"Wilfully" adds another concept to that. It is almost the same definition. You do an act wilfully when you do it voluntarily and freely, not through mistake, inadvertence, or in good faith, but you do it with an evil mind, a bad intent, a bad motive. This is the very essence of our law.

The whole thing is on that on e pivot. It is assumed that you, and I, and everybody else, has the willpower, and that if I want to I can reach over and drink that glass of water or I can leave it alone. If I want to I can get up and leave or I can stay here. If I want to get into a crime, I can do it. If I want to do it I can do it freely and voluntarily. So it is the exercise of that will that our law proscribes, and it says if you use your will in an area which is proscribed by Congress and which Congress says is a crime, then you are acting wilfully, you are doing it voluntarily and freely, you are not doing it by mistake, inadvertence, or in good faith, you are doing it with an evil intention, a bad motive, and therefore you are responsible for your conduct. That's what those three letters means.

The next one is "Corruptly". "Corruptly" is almost the same concept as acting wilfully. An act is corruptly done if it is done voluntarily and intentionally with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by unlawful means; so a person acts corruptly whenever he makes a wilful attempt to persuade, or influence, a public official by an offer of money or anything of value. The motive to act corruptly is ordinarily a hope or expectation of financial gain or other benefit to one's self or to some

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other. That's the way you act corruptly which, essentially, means wilfully, with a bad motive.

Now you have the words "specific intent".

We are not responsible for acts which we don't intend.

This man cannot be convicted of the crime of conspiracy unless he had the specific intent to commit the crime.

To establish specific intent, the government must prove

that the defendant knowingly did an act which the law

forbids, purposely intending to violate the law. Such

intent may be determined from all the facts and

circumstances surrounding the case, and here is where circum-

stantial evidence comes into play because it is a mental

process and, therefore, it is not visible to the eye, and

you must determine it from the surrounding facts and circumstances.

The word "fraudulent" is used in this indictment, and a "fraudulent statement" means a false statement made or caused to be made with intent to deceive.

We also in the statute have a phrase "intent to defraud the United States." To defraud, to act with intent to defraud, means to act wilfully and with the specific intent to deceive or cheat, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self.

1
2 However, the evidence in the case need not establish
3 that the government, or any person, was actually defrauded
4 but only that the accused acted with the intent to defraud.
5 When we get to the phrase "to defraud the United States,"
6 this means not only to cheat the government out of property
7 or money, but it also means to impair, interfere, or
8 obstruct one of the lawful governmental functions of the
9 United States, in this case the post office, by dishonest
0 means.

It is not essential to the indictment in this case,
to the theory of the indictment in this case before you,
namely the conspiracy to defraud the United States, that the
United States actually suffer some financial loss. The
gist of the offense is the combination or agreement that is
designed to impair, obstruct, or defeat the lawful functions
of any department or agency of the United States -- and the
post office was at the time in question. Thus, a conspiracy
of this kind must have as a central feature, a quality of
misrepresentation, overreaching, on the part of the
defendant and those charged with carrying out governmental
functions.

In this sense conspiracies to defraud the United
States include conspiracies to interfere with the performance
of official duties by government officials, a conspiracy

tending to deprive the United States of a fair, unhindered, unobstructed performance of official duties. The government has a right to have its business affairs carried on honestly and impartially, free from fraud, free from improper or undue influence, dishonesty, or unlawful impairment or obstruction. That's what we mean by the -- I do not think it is on the board -- intent to defraud, and the intent to defraud the United States.

So now we come to the last definition which is important to you in this case, and that is: What is a conspiracy?

Congress has defined a conspiracy. In Section 371 of Title 18 "Conspiracy" is defined as follows:

It starts off with a general definition of a conspiracy in law as being a combination of two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful means. That is essentially what we define conspiracy as.

Congress has passed the following section:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner, or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each of those persons shall be

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guilty of a criminal offense.

That's essentially the definition of a conspiracy.

There must be two or more persons. You can't conspire with yourself. There has to be two or more persons.

It must be with the object of performing an offense against the United States or defrauding, and then there must be what we call "an overt act" in the case. There must be something done to effect the purposes of that conspiracy.

This is separate and apart from any of the laws which are passed by Congress. There are two offenses possible, for example, to a case like bribery.

I conspire with my law clerk, and I don't want to get him in trouble, but just to make it understandable; we are going to rob a bank. I say to him, "I am going to get a car. You go down to the Five and Ten and get a flashlight because we are going to go down to the Chemical Trust Bank and rob that bank."

He says, "Okay." He goes down to the Five and Ten, goes along the counter, and finds a flashlight. He pays for it and walks out. That is a perfectly legal act. There is nothing illegal about that. Anybody can go to the Five and Ten. If you have money you can buy a flashlight.

Now he meets me and we go down to the bank at night. We use the flashlight. When he bought the flashlight that

was the overt act that consummated the agreement to rob the bank. That's a crime from that point on. Both of us are in it voluntarily and wilfully.

Now we go into the bank and rob the bank. That's another crime. That's separate and apart from the agreement.

Congress has seen fit to pass this law to say that if a man is going to commit a crime, if he enters into an agreement to do so, and he does something to effect its purpose -- because that's one beautiful thing about our jurisprudence: We don't punish people for ideas and we have all kinds of ideas in us, no question about that; all kinds of people want to do all kinds of different things, and some of them are destructive to other people around, and we never do anything about it until they do something about it --in other words, we don't consider a crime to be complete until something is done in furtherance of that crime, and that is the same with the conspiracy.

As soon as something is done in furtherance of the crime, the crime of conspiracy has been established, and that's it. So that is a definition of conspiracy under the definition of terms.

We then come to the law of conspiracy because in addition to the definition of conspiracy, actually, there is

1
2 a certain law surrounding this conspiracy.

3 In discussing the offenses against the United
4 States a minute ago, I want to mention that there are
5 three offenses involved here that are named in the indict-
6 ment, and I put them off on the side there. You see
7 201, 203, 1341, and then, lastly, the conspiracy. In
8 this case, in line with my policy of trying to make you under-
stand these terms as simply as I can, I have used what I
would say shorthand in describing what these sections are.

I could read these sections -- 201, for example --
and there would be a long string of terms -- but when you
get all through with it, what it says is this:

Just as Congress has been smart enough to put in
the heading -- this section deals with bribery -- then it
goes on in that long language, so the shorthand of that
section, 201, is bribery, and it includes not only the
giver of the bribe but the taker of the bribe. It includes
both and makes them both a crime.

The other offense is 203, and when you look at
that it specifically names the Congressman as being the one
who can be charged with this crime, and what we are talking
about is conflict of interest. That's the shortening of
it. So when we talk about 203, we talk about conflict of
interest.

The last one, 1341, that's the mail fraud section. That's the section that has been in there a long time, and what it simply says is: Mr. Criminal, if you are going to commit a crime and you use the mails to commit the crime, you are committing a federal offense. So it says: If you enter into a scheme to commit a crime and you use the mail or the mail's use is reasonably contemplated in that crime, then you have violated this other section of the law.

Those are what we call the three substantive sections involved. That's the substance of the law. That's the law that was passed by Congress.

The other law is the one I have been talking about, that's 371, and, of course, that is the conspiracy statute.

Now what about the law of conspiracy? What is the law of conspiracy? You remember when we first started out I said to you, "Look, I am going to tell you a little bit about the law of conspiracy because you are going to have to decide this case and you should know a little bit about the law." What I am about to tell you now is almost the same thing I told you at that time.

Taking my lesson from our school teacher friend, you should never say anything less than twice when you teach anything, and maybe say it three times. I am going to say it twice now.

The defendant has been indicted for the crime of conspiracy to commit an offense against the United States, or to defraud the United States or any agency thereof in violation of Section 371 of Title 18. To convict the defendant of this offense, the government must prove beyond a reasonable doubt, first, the existence of the conspiracy to commit the offense of defrauding the United States or an agency thereof, or to commit an offense in violation of Sections 201, 203, and 1341 of Title 18, or any one of the sections. You know that 201 is bribery; 203 is conflict of interest; and 1341 is mail fraud.

You will notice that I said "or any one of these sections," because this time, as I will go into it later, there are seven subdivisions, and one of the subdivisions is divided into three, and they are all means that are alleged by the government that this defendant used to accomplish his purpose.

Let me say why we say one or more. Suppose you want to go to Albany. You have a car. You can go up to Albany on the Taconic Parkway, which is on the west side of the river, and you can go right straight up. You can cross over the George Washington Bridge, get on Route 17, and then go up to Albany. You can go up the West Side, get on the New York Thruway, and then go up to Albany. There are

1 many ways to get to Albany. Of course, some of the ways
2 you don't have to pay a nickel. That's the way I always
3 drive. My wife gets mad; she thinks I should be paying
4 tolls. I refuse to do that.

5 But if you go up the New York Thruway you have to
6 pay tolls and if you cross the George Washington Bridge
7 you have to pay tolls.

8 So the United States Attorney must pay tolls
9 when he picks a route. He must satisfy you by a particular
0 mean that he has paid the toll, that he has satisfied all
1 the legal requirements for that particular mean he is talk-
2 ing about. As I said, it starts with seven and one is
3 divided into three. The government doesn't have to prove
4 that all of these means were accomplished, but when you are
5 satisfied as to which means were used, and if you are satis-
6 fied that at least one mean was used, that would be suf-
7 ficient. The government doesn't have to prove all
8 seven of them plus the subdivision of the last one; the
9 government need prove only one.

0 But I caution you on this to make sure that they
1 are all talking about the same mean, because you must be
2 unanimous on the particular mean you are talking about;
3 so if you find the government has satisfied you by credible
4 evidence beyond a reasonable doubt as to a mean, or more than

one mean, or all the means, and you are all unanimous in that particular area, one mean or more, then, of course, that would satisfy that element of the indictment.

Let me go back so you can get the full thought of it. It is incorporated in the next thought.

To convict the defendant of this offense, the government must prove beyond a reasonable doubt the existence of a conspiracy to commit the offense of defrauding the United States or an agency thereof, or commit an offense in violation of 201, 203, and 1341 of Title 18, or any one of these sections; that the defendant knowingly and wilfully became a member of the conspiracy; and during its existence and on or after October 23, 1968, at least one overt act was committed by one or more of its members in furtherance of the objects of the conspiracy.

That simply follows the requirement of Congress. It says an overt act must be done.

In this particular case you must be careful when you come into this area of discussing whether or not the government has satisfied the proof. There is a statute of limitations, and I will explain it to you later. One of these overt acts must be completed after the date that I just read to you, which is October 23, 1968. I will explain that later as we get to that particular point.

It is a conspiracy to commit the offense of defrauding the United States or an agency thereof, namely violations of Sections 201, 203, and 1341, which is the crime charged, and it must be established regardless of whether the purpose of conspiracy was accomplished or whether the substantive crime was committed.

In other words, remembering back to the robbery, it becomes a crime when the flashlight is bought and we start down to the bank. There doesn't have to be a bank robbery. We are guilty of the crime of conspiracy at that time. Similarly, here, you do not have to be satisfied that there was a bribery. You don't have to be satisfied that there actually was a conflict of interest. You don't have to be actually satisfied that the mail fraud scheme was, in fact, consummated, but you have to be satisfied that there was an agreement to do that. That's sufficient.

As I told you before, a conspiracy is a combination of two or more persons to accomplish an unlawful purpose or lawful purpose by unlawful means. While it involves an agreement to violate the law, it is not necessary that the persons charged met together and entered into an express or formal agreement, or that they stated in words or writing what the scheme was or how it was to be effected. It is sufficient to show that they tacitly came to a mutual

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understanding to accomplish the unlawful purpose. Such an agreement may be inferred from the circumstances and conduct of the parties since ordinarily a conspiracy is characterized by secrecy.

In determining whether a conspiracy existed, you should consider the acts and declarations of all the alleged participants. In determining whether this defendant is a member of the conspiracy you should examine and consider all the evidence in the case. Mere association does not establish a conspiracy, nor is a conspiracy without participation therein sufficient to constitute membership. What is necessary is that the defendant participated with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends. The defendant cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of its members.

To be a member of the conspiracy, a defendant need not know all the other members or all the details of the conspiracy, nor all the means by which the objects would be accomplished. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that the government prove by credible evidence beyond a reasonable doubt that the defendant was aware of the common purpose and

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1 was a willing participant with intent to advance the
2 purposes of the conspiracy. The extent of his participation
3 is not determinative of his guilt or innocence. His financial
4 stake, if any, in the venture is a fact to be considered
5 in determining whether a conspiracy existed and whether
6 a defendant was a member of it. If it is established
7 beyond a reasonable do bt that a conspiracy existed and that
8 the defendant was one of its members, then the acts and
9 declarations of the other members of such conspiracy, in
10 or out of the defendant's presence, done in furtherance of
11 the objects of the conspiracy and during its existence,
12 may be considered as evidence against the defendant.
13

14 When persons enter into an agreement for an unlawful
15 purpose they, in effect, become agents for one another.
16 It is not necessary that all the overt acts charged in the
17 indictment were performed. One overt act is sufficient.
18 An overt act means any act by one or more of the conspirators
19 to accomplish the purpose of the conspiracy. It need not
20 be in violation of the law and the other conspirators need
21 not join in it or even know about it. It is necessary only
22 that such act be in furtherance of the purposes of the
23 objects of the conspiracy and, in addition, in this case,
24 you must also that at least one of the overt acts charged
25 was committed within the statute of limitations' period --

and I will explain that to you later.

So now I have defined the terms. I have told you what evidence is, what evidence is not, how to evaluate evidence, and now we get down to the indictment itself.

This is not going to take too much longer at this point because we really have already covered much of the area involved. Since you are going to have the indictment I want to go through it with you so you will understand it as you go through it.

When we look at the indictment the first page contains paragraphs 1 through 5, and it is headed "Introduction." All that does is describe some of the people that are involved and some of the corporations. That's all that the first five paragraphs does.

For example, the first one says that the defendant, Frank J. Brasco, was a member of Congress.

The second one says that Joseph Brasco was an uncle.

The third one says that co-conspirator Doherty was employed with the post office.

It just describes some of the people, some of the corporations. Those are paragraphs 1 to 5.

Let's get on with it.

Then it says: Count 1. Don't let that deceive

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you. There is only one count in the indictment. There has never been any other count. I don't know why they put "Count 1" in. It is the only thing that we have. That should read "Conspiracy Charge." That's what it really should read.

Now we start in with the conspiracy charge. The roll-up of it and the sense of it is contained, really, in this first paragraph, No. 1, and on the second page from 2 to 8, A, B, and C -- those are the means it is to be accomplished by, so, essentially, a conspiracy is set forth in the first paragraph, and this is what you must find, and you must find each one of these elements by credible evidence beyond a reasonable doubt before you can continue.

If the government failed to prove any one of them beyond a reasonable doubt then you must acquit him.

The first thing that you come across is that it says the conspiracy was from June, 1967 to and including January 4, 1969. That does not mean to say that the government has to show you that the conspiracy started on that date and ended on that date, but it must show you it was within that period.

Then it says "In the Southern District of New York." I have already told you I take judicial notice that this is the Southern District of New York, and that some of these

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acts, if they did happen, happened in the Southern District.

Then it goes on to name the District of Columbia elsewhere. Frank Brasco and Joe Brasco -- the only defendant we have before us is Frank Brasco, and I have already told you that the fact that Joseph Brasco is not here today cannot help you in your determination at all.

Then it says Joseph Doherty and Masiello, co-conspirators but not defendants -- that names other people involved in the conspiracy -- and then it uses the troika that I was talking to you about, unlawfully, wilfully, and knowingly. Well, you know what those terms are.

They acted voluntarily, freely, not by inadvertence, not by mistake, nor in good faith, and they acted with an evil, bad, motive. You must find that. You must find that beyond a reasonable doubt.

Then the indictment continues on: Did combine, conspire, confederate, and agree. Lawyers are funny. They never say anything in one word that they can say in four or five. What they are saying is they conspired, and so the other terms are sort of descriptive of it when they say: Confederate, combine, and agree. The real element that this defendant is being charged with is conspiracy. Here I explained it to you before: Conspirare. This is an old Latin word which means to breathe together.

Ordinarily you can just say they agreed and you can say maybe they agreed in Macy's window, or maybe they agreed in Grand Central Station. When you get the concept of 'conspire,' which means to breathe together literally, then you get the element of sort of secrecy.

So I defined conspiracy for you and you are aware of what that is, and you would have to find that there is, in fact, a conspiracy beyond a reasonable doubt before you can convict.

It is alleged that they conspired together with these people named and others not known to the grand jury to obtain and retain from the post office truck leases and moneys payable thereunder for Masiello and his corporations by unlawful and fraudulent means.

I have already defined to you what unlawful and fraudulent means are; to wit, the defrauding of the United States, and I have defined for you what defrauding the United States is: By committing certain violations, offenses under 201, 203, and 1341. Those are bribery, conflict of interest, and the mail fraud sections. It has all been defined for you.

So that is, essentially, the conspiracy charge in the first paragraph.

We start with No. 2 and end with 8C, various means.

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No. 2, for example, is really talking about defrauding under the concept in the statute, and really is concerned with those incidents with ANR and Randen, and so forth, and how the contract was gotten and how it was later taken over by Randen. That's the second paragraph.

The third paragraph essentially talks about that \$2,000, I believe. You can read it yourself and make up your own mind, but that seems to be the \$2,000 that Doherty got.

It says that he defrauded the United States by payment of money to Joseph Doherty and so forth. That's the third paragraph.

The fourth paragraph is a defrauding concept after the lease was cancelled and then Randen came into the picture. That's the fourth.

The fifth is essentially a bribing charge and talking not only about the giving of the bribe but the taking of the bribe. That's the fifth one.

The sixth one is essentially a conflict of interest charge under 203, and the charge is, in effect, that the defendant was seeking compensation for acts which he had to do under his official status. That's the sixth.

The seventh is the mail fraud section, namely that there was a scheme to defraud, and that the scheme was the

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means that were mentioned between 2 and 5.

Lastly, we have --

JUROR NO. 10: Your Honor, may I be excused for a drink?

THE COURT: We will take a five-minute recess. Don't discuss the case.

(Recess.)

MR. SHAW: Your Honor, may I bring one thing to the Court's attention that comes close to being technical, but I think your Honor said it one way and then another way.

When you get to the statute of limitations I would like to be sure I make my point before that. The only requirement is that there have been an overt act on or after October 23rd, not just -- in other words, it could have been October 23rd.

THE COURT: It could have been exactly on the 23rd.

MR. SHAW: The law is cited in our request.

MR. LYON: Didn't you say that?

THE COURT: I thought I did.

MR. SHAW: I thought the Judge said "after".

THE COURT: I may have said that. I am aware of the concept, and I will make it clear.

MR. LYON: You did say "beyond a reasonable doubt," and sometimes you repeated it and you may not have

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put in that expression. If you do explain again, would you please do that again.

There is one place I can think of now, I have notes, and I will wait until after the charge, but when you read the indictment and you start explaining what it means, you sort of say he acted wilfully, falsely, with evil intent. Of course you are saying the indictment charges that.

THE COURT: And you must find that beyond a reasonable doubt.

MR. LYON: The way you are saying it, I don't know whether they know that the indictment charges it. Could you explain to them when you read the part of the indictment, that's what the indictment charges and they have to find it was true beyond a reasonable doubt?

THE COURT: I will make it clear to them.

(Jury in box.)

THE COURT: I might indicate that a few things came to mind when you were in recess.

I might indicate to you the fact that the things I am reading from this indictment is what the government has to prove, and my just reading it doesn't mean to say that I feel the government has proven it. It is your function to determine whether the government has proven them, and it must be proven beyond a reasonable doubt.

1
2 When I mentioned the three crime statues of
3 bribery, conflict of interest, and mail fraud, of course
4 there is the other element in it of defrauding the United
5 States, which I also described to you before. So there
6 are, essentially, four areas involved here, namely the
7 defrauding of the United States, bribery, the conflict of
8 interest and the mail fraud. Those are the elements.

9 When I was talking to you about accomplice
10 testimony I indicated to you that Mr. Shaw contends that there
11 was corroboration in the fashion indicated to you, but the
12 fact that he said so, of course, you must be satisfied
13 yourself. That's your function, to find whether there was
14 corroboration or not in these various areas. Those are
15 the thoughts I had while I was waiting for you to come
16 back.

17 Getting on with the indictment, as far as 8 is
18 concerned, here again we have a number of means, three means.

19 The first one concerns the \$10,000 that was
20 mentioned during the course of the testimony. That of
21 course would be No. 201, the bribery, and, conceivably,
22 it might be under 203 also as conflict of interest.

23 The second part of 8 is B, a conflict of interest
24 charge, and that concerns the testimony in reference to the
25 loan and the fact that the defendant was to get part of that

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\$17,500, and so forth.

The last one, to defraud, is the one that comes under 1341, which is the mail fraud section.

Those are the means that the government has alleged, and, as I indicated to you before, the government need not prove all of them. As long as you are satisfied as to any one of them unanimously by credible evidence beyond a reasonable doubt, that would be sufficient to cover this particular indictment, this particular charge.

Lastly we come to a series of overt acts, and here they number from 1 to 16. I decided that two of them do not apply to this case whatsoever at this point, and those are numbers 13 and 16.

Essentially, in this area, what you must find before you may convict the defendant, is that you are satisfied by credible evidence beyond a reasonable doubt that one of these overt acts, starting with No. 10 and including No. 10 was committed, and as I have indicated to you, when you look at this -- and I will cross out Nos. 13 and 16 -- you may find either 10, 11, 12, 14 or 15, any one of those, was committed by any one of the co-conspirators in the life of the conspiracy and during the statute of limitations. The statute of limitations' period starts October 23, includes October 23, and continues on from that.

point.

We have discussed the indictment and we will now come to the contentions of the two parties. I am not going to belabor you with that. You heard that three or four hours in the morning and three or four hours in the afternoon yesterday. You heard the two lawyers make their various contentions. I can go through them. I don't think it would add anything at this time because I think you are fully aware of it.

So your job now is to consider this indictment, consider the totality of the evidence in the case, all the evidence in the case that you have heard, place it where it belongs, make a judgment, and then, after you consider the totality of the evidence, you will then determine the guilt or the innocence of this defendant.

To summarize this particular area, the last part, if you find by credible evidence beyond a reasonable doubt after considering the indictment, after considering all the evidence, after discussing it with your fellow jurors, that a conspiracy existed as charged in the indictment and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one or more of the conspirators in furtherance of some object of the conspiracy and within the statute of limitation period, proof of the

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1
2 conspiracy is then complete. It is complete as to this
3 defendant if you find that credible evidence beyond a
4 reasonable doubt that he was a knowing and wilful member
5 of the conspiracy at the time the overt act was committed,
6 regardless of which of the other conspirators committed the
7 overt act. If any one or more of all these elements is
8 not proven to your satisfaction beyond a reasonable
9 doubt, then you must acquit the defendant. If you find that
10 the government has proven these elements by credible
11 evidence beyond a reasonable doubt, then you should convict
12 the defendant.

13 I would like to go back over the statute of
14 limitations' aspect of this because I think I missed a page
15 as I was talking to you, and I want to make sure you under-
16 stand this concept.

17 The statute of limitations is simply the period of
18 time in which one must formally be accused of a crime after
19 its alleged commission. The statute of limitations has
20 been enacted in order to protect defendants in order to
21 defend against charges in the remote past. Time dulls the
22 memory and the likelihood of reconstruction of the events
23 years gone by, and it may prove to be a laborious task for
24 the defendant. In this case the statute of limitations
25 is five years. The defendant was formally accused of the

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crime charged on October 23, 1973. Going back five years from that date the statute of limitations began to run on or about October 23, 1968. If the government had failed to prove beyond a reasonable doubt that any act in furtherance of the alleged conspiracy was committed on or after October 23, 1968, then you must acquit the defendant.

Since the defendant has to prove nothing, the burden rests upon the government to prove that the crime alleged to have been committed occurred on or after an overt act was committed on or after October 23, 1968.

The defense of statute of limitations is not a legal technicality but is a substantial right which every defendant has. Moreover, raising this defense is not to imply the defendant was in any way connected with this involvement. That's a judgment for you to make. I therefore instruct you that before you may find the defendant guilty you must unanimously find beyond a reasonable doubt that at least one of the overt acts numbered as I have indicated before, 10 through 15, with the exception of 13, was committed on and after October 23, 1968 by one of the conspirators in furtherance of the aims of the conspiracy and during the life of the conspiracy. That, essentially, is what you need in order to decide this case.

There are certain things I must call to your attention very briefly.

You must consider the totality of the evidence when you consider this evidence.

You must decide this case without fear or favor. Sympathy and bias play no part in your determination. You must perform your duties as a juror without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. Both the defendant and the public expect you will carefully and impartially consider all the evidence in the case, follow the law as stated to you by the Court, and reach a just verdict regardless of the consequences.

I strongly urge you not to stultify your oath of taking your position here as a juror. You must vote your conscience and you must vote in a fashion which you have already sworn to do, namely upon the evidence in the case and the law as given to you by the Court.

Punishment is not your concern. This is the role of the Court. Your verdict must be unanimous, and the verdict will be either guilty or not guilty.

I indicated to you last night, when you left, how you should conduct yourself when you go into the jury room. In other words, don't make up your mind immedi-

1 ately; don't immediately announce one way or the other
2 how you feel. Listen to the discussion of the case between
3 you, and make any suggestion that you particularly feel
4 should be explored, and after you have had complete
5 deliberation in it, then I suggest you vote your conscience.
6

7 If there is anything you have to communicate to the
8 Court, it will be done through the foreman. Any one of
9 you may communicate any thought that comes to mind, and
10 it will be sent in here, and I will answer whatever questions
11 you may put to the Court.

12 The minutes have been taken here every day, and
13 we have these volumes that contain all the testimony.
14 So whoever is the foreman, if there is any one that wants
15 to know what the particular testimony is and wants it read
16 again, please try to pinpoint it as much as possible.
17 What witness are you talking about? Is it on direct or
18 cross, redirect or recross? Pinpoint it as best as you
19 can so that we will know exactly where to look for it.

20 If you reach a point where there is some agreement
21 and disagreement between you, please do not report to the
22 Court what that agreement or disagreement is. We do not
23 want to know anything from the jury as far as the verdict
24 is concerned unless it is unanimous. It must be
25 unanimous. Don't report anything that happens in between,

1 if anything does happen in between.

2 The exhibits in the case are available to you,
3 and I presume I have the authority of both parties to
4 have the clerk bring in the exhibits when you desire them.

5 MR. LYON: That's correct.

6 MR. SHAW: That's correct.

7 THE COURT: Some of you have been taking notes.
8 You remember what I said to you about taking notes when
9 we originally spoke about that. Those notes are for your
10 benefit. They would help you in determining what you
11 remember and what you don't remember about the case, but you
12 may not say to another juror, "I have it written down here
13 and therefore it is right." It is only right insofar as you
14 feel it is right. If there any dispute about that
15 particular area, I suggest the thing to do is have the
16 minutes read and then you both can be satisfied as to what
17 was said or what was not said at that time.

18 I have one last time that I talk to the lawyers,
19 and we will do that inside. Then, as soon as we are
20 finished, the case will be turned over to you.

Please be patient.

You may have a recess while we are doing this.

(Jury excused.)

(In the robing room.)

THE COURT: Well?

MR. LYON: Judge, I think that on the question of accomplice there are two points I have to make. One is that regardless of whether there is corroboration or not, an accomplice's testimony should be considered -- you said it should be considered with caution unless -- you said accomplice testimony without corroboration should be considered with caution.

THE COURT: I will give it to you as it was said --

MR. LYON: I don't think it came out right.

You didn't read that.

THE COURT: I read it:

"However, you should keep in mind that such testimony is always to be received with caution and weighed with great care."

MR. LYON: What did you say before that?

THE COURT: (Reading) "An accomplice is one who assists or unites with another person or persons in the commission of a crime voluntarily and with criminal intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though it is not corroborated or supported by other

evidence. However, you should keep in mind that such testimony is to be received with caution and weighed with great care."

MR. LYON: I don't remember hearing that.

MR. SHAW: Shouldn't Mr. Brasco be here, your Honor?

(Pause.)

(The defendant entered the robing room.)

THE COURT: I think I even put "with great caution."

MR. LYON: It seems to me you tied it up with corroboration so the impression is left that if there is corroboration you don't need caution.

THE COURT: What is the next one?

MR. LYON: The next one, you talked about the fact that the jury must find a corrupt motive and other things, wilfulness and knowledge and evil intent and so on. I don't think you explained to the jury that if they do not find that they must acquit.

In other words, you put it on this side: That the law says that he has evil intent and he has this and that, that's what you have to find. You don't say if you don't find it --

THE COURT: I note your exception. I feel I covered

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2 that.

3 What else?

4 MR. LYON: This one you fixed up after the
5 recess. You probably will say the same thing. I was going
6 to ask you to say if there is not proof beyond a reasonable
7 doubt that Mr. Brasco knew that a conspiracy existed and
8 actually joined it, you must acquit.

9 THE COURT: You have an exception to that.
10 I think I covered that.

11 MR. LYON: On the question of false exculpatory
12 statement, in the first place I submit that the talk about
13 meetings is not a prior false exculpatory statement.
14 You lumped talk about meetings together with the FBI
15 report.

16 THE COURT: He denied here there were meetings.

17 MR. LYON: He denied a lot of things.

18 I take exception to your putting that in as a
19 false exculpatory statement because if he says, "I did not
20 join the conspiracy," that could also be considered a "
21 false exculpatory statement.

22 THE COURT: I will indicate to the jury that the
23 sense of that was that the rules that apply to that kind
24 of thing are the same, but it is not a false exculpatory
25 statement, simply a conclusion they can draw --

1
2 MR. SHAW: Excuse me.

3 MR. LYON: Let me finish.

4 It is on the same point. In that regard, since
5 you did mention meetings, I ask that you also consider
6 telling them they have a right to consider whether Weiner
7 and Masiello and Doherty are lying as to the meetings.
8 You said they may consider whether Mr. Brasco is lying.
9 They can also consider whether the other alleged partici-
10 pants are lying.

11 THE COURT: What did you want to say?

12 MR. SHAW: You made the distinction just now
13 between prior false exculpatory statements and false
14 exculpatory statements at trial. The law applies
15 equally to both. It is the same proposition.

16 THE COURT: I will point it out to them that I
17 didn't intend to indicate that this was a false exculpatory
18 statement that he made to the FBI man. As he has
19 indicated in court, he was not at the meeting. If you find
20 he was at the meeting that would be --

1 MR. LYON: Is it clear to them that when you say
2 that they may consider a false exculpatory statement they are
3 the ones that have to determine whether that statement to the
4 FBI is false?

5 THE COURT: I did tell them that.

1
2 MR. LYON: That's our argument. I don't understand
3 the purpose of that in this context because in this case
4 it is not a question of his having made a prior statement
5 to the FBI which they definitely proved is false. He has
6 made the same statement to the FBI and he has not extended
7 it -- he has made the same thing.

8 He said, "I never took money from Weiner."

9 THE COURT: I will note the exception, but I am not
10 persuaded. I did indicate that if he made a mistake or was
11 not -- it is not a false exculpatory --

12 MR. LYON: The point is that in this case the
13 issue is the same. If he lied to the FBI he is lying here.
14 If he lied here he lied to the FBI. It is not another
15 statement that is not contained in this trial.

16 MR. SHAW: That's not right. The statement
17 to the FBI is that he met in early 1968. He has acknowledged
18 that that was inaccurate.

19 THE COURT: In any event, I do not want to keep this
20 jury out too long. I would like to move on.

21 MR. LYON: I would like to take exception to the
22 twigs analogy only because it can raise an impression that
23 quantity counts.

24 THE COURT: I will note the exception.

25 MR. LYON: What I request your Honor to do,

1 and I think this request should be able to satisfy it, is
2 to say one may never make a determination as to the value
3 of circumstantial evidence by quantity alone. It is
4 always quality that counts.
5

6 Do you understand my point? When you say you have
7 twigs you can't break, it is really never quantity but always
8 quality.

9 MP. SHAW: I have no objection to that.

10 THE DEFENDANT: May I say something?

11 On this twig business --

12 MR. LYON: Wait until you hear me.

13 What I wanted to say in regard to that, you gave
14 an example of the circumstantial evidence that the government
15 gave and you mentioned --

16 THE COURT: Which one?

17 MR. LYON: You gave a whole litany, the documents
18 and various other things you said he did. We also have
19 circumstantial evidence here and they should be apprised of
20 that. The defense also gave circumstantial evidence,
21 including documents, that was the Sheehan document, the
22 argument that Coffman, et al., were friends of Doherty.
23 The fact that Masiello said he found out there had been
24 a cancellation from the 34th Street Garage and not from
25 the Brascos --

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MR. LYON: There is circumstantial evidence from both sides.

THE COURT: What else?

MR. LYON: I think there may have been a little confusion when you mentioned witnesses. I think you mentioned all the witnesses of the government. We have other witnesses besides the ones you include as character witnesses.

By the way, Cardone was a character witness.

THE COURT: I will tell you what I did. I made a thing about it. Look on the desk there (indicating).

MR. LYON: I think you left out Harris, DiLorenzo.

THE COURT: I didn't mention all the people in the post office by name. I had them all in the list, but I didn't mention them by name.

MR. LYON: They were not character witnesses. They were our witnesses.

THE COURT: I said they were post office witnesses and so forth. I have them all here. I just lumped them all together.

I don't know what is to be gained by going back and picking out any particular one. I indicated to them they should consider the interest of everyone.

1 THE DEFENDANT: Your Honor just mentioned former
2 employees.

3 MR. LYON: You were talking about interest, the
4 one who had an interest. You said there were former
5 employees.

6 THE DEFENDANT: They were employees of mine.

7 MR. LYON: The only witnesses you mentioned for
8 us were that we had former partners and former employees --

9 THE COURT: I mentioned --

10 MR. LYON: You never mentioned that we had witnesses
11 from the post office on our side. You never mentioned that.

12 THE COURT: All right.

13 MR. LYON: We had Sheehan, Harris, and DiLorenzo,
14 whom we produced.

15 THE COURT: All right.

16 MR. LYON: I took this down precisely. Your Honor
17 made a little mistake of memory when you talked about
18 reasonable doubt. You finally said -- and I am quoting the
19 language -- "That is the kind of doubt you must have before
20 you may convict the defendant."

21 THE COURT: Acquit.

22 MR. LYON: Please tell them you meant that if you have
23 that kind of doubt you have to acquit.

24 THE COURT: I will. If that's what I said --

MR. LYON: It is early in the case. You can find it if you want.

THE COURT: All right. That is the kind of doubt you must have before you convict.

MR. LYON: You mentioned that he had a right to be a lawyer. The other right he has, and you did say it to us when we were talking in the robing room, was the right to pursue somebody's case to the different departments so long as he didn't do it in violation of the statute.

THE COURT: That's right. I think I have a note here. I probably skipped it. I had it in here. It is only on one line. I must have gone over it.

MR. LYON: All we need is that he has a right to make inquiries. He has a right to do more than make inquiries. He even has a right to plead the case of a particular person.

THE COURT: Is there anything else?

MR. LYON: Mr. Wender tells me we gave you a request. I don't know whether you ruled on it, but in the light of the fact that Masiello is not here that his testimony must be --

THE COURT: I decline to do that. I declined to do that yesterday.

MR. LYON: I don't care too much.

2 The one I am concerned about is a little slip of
3 the tongue, and the other one about the Congressman has a
4 right to plead a cause as far as -- I would not go on for-
5 ever.

6 MR. SHAW: Just for the record, we do except to
7 not having that longer charge and reasonable doubt, but I
8 took that up the other day.

9 (In open court.)

10 (Jury in box.)

1 THE COURT: The lawyers have again assisted the
2 Court, and I appreciate their assistance because you can
3 well realize that in trying to cover a case like this it is
4 quite a job. We want to make sure that the rug is wall to
5 wall, and that we don't leave any open spaces.

6 I was talking about the fact that if there is
7 an exculpatory statement made and you find that it is
8 false -- and that's your function to do that, to discover
9 whether it is false or not -- if you find that to exist,
10 it may be consciousness of guilt on the part of the
1 defendant.

2 At that time I also indicated the fact that there
3 were three alleged meetings which the defendant denied.
4 You might get the impression that I was saying they were
5 false exculpatory statements. They are not considered in

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2 that light although the principle of law is the same,
3 namely, if you find after all this evidence that
4 there were these meetings then, of course, that would be
5 considered consciousness of guilt on his part.

6 The reverse of that coin is, of course, that if you find
7 there were not, then you would consider that to be false
8 on the part of Masiello, Weiner, and Doherty that such
9 meetings did, in fact, take place. Remember that.

10 In using the fascistic example that I gave you,
11 the Roman Senate had these bands of rods; they walked
12 around with a bunch of sticks on top of this ax which was
13 called fasces, and that's why they called Mussolini a
14 fascist, because that was the symbol, an old Roman symbol,
15 a bundle of twigs.

16 You might get the impression that what I was talking
17 about was the number of twigs. I am actually talking about
18 the quality of the number of twigs. In other words, it
19 is not the number of twigs that count, it is the quality of
20 those twigs, the quality of circumstantial evidence that you
21 are to consider. Of course, I am not suggesting you only
22 listen to the litany by Mr. Shaw but also to the circum-
23 stantial evidence that was referred to by Mr. Lyon during
24 the course of this proceeding, and he has, of course --
25 Mr. Sheehan, he brought in, you remember, that's a piece of

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circumstantial evidence, and other pieces of circumstantial evidence that were produced on behalf of the defendant.

You will consider all of that.

In defining reasonable doubt I understand I pulled a boner. I said that if you find beyond a reasonable doubt then you should convict the defendant. I meant you should acquit him. If you find the government has not proved his guilt beyond a reasonable doubt, you are to acquit him.

MR. LYON: You said that is the kind of doubt you must have before you may convict the defendant and, of course, you meant that is the kind of doubt you must have before you acquit the defendant.

THE COURT: You are perfectly right.

That's the second time Mr. Lyon has been knowingly right in this case.

Then we get to the Congressman. He has a right to be a lawyer. He has a right to be a Congressman. When he is elected he has a right to help his constituents. He has a right to go to agencies to help people, to go to departments and to go to different governmental people and try to help his constituents. But the nub of the case is: Did he do it corruptly or did he not? There is no question he had a right to do these things, but did he do it corruptly?

That's the nub of the case.

You are still in the custody of the marshals.

At this point we will have to excuse the alternates.

I am very, very thankful for them.

(The four alternates were excused.)

THE COURT: As soon as you elect your foreman, make up your mind whether you want any exhibits and we will send them in.

(12 noon the jury began its deliberations.)

(In the robing room.)

THE COURT: You have read the affidavit?

MR. LYON: I did not see it.

(Pause.)

MR. LYON: She did know Maria Purpo.

THE COURT: She didn't know what kind of job she had. That's the thing.

MR. SHAW: If there is any question about it, we better hang on to those alternates.

One thing, your Honor: After both sides closed I took -- with respect to a document that counsel had offered in evidence, Masiello's letter to me, which had an envelope attached to it, I want to change that position.

I have no objection --

THE COURT: There is no problem. Let the whole

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thing go in.

(Court Exhibit 23 was marked.)

THE COURT: I have a note. They want the black-board.

MR. SHAW: There is one other thing I want to put on the record.

During the summation Mr. Lyon drew the jury's attention to the argument that there was different colored handwriting by Doherty, and that was not drawn to their attention during the trial. Under those circumstances I want to ask that entire diary go in. When you look through the diary there is a lot of different pens used from time to time. I am not suggesting unfairness on his part, but he didn't think to cross examine Doherty; but when he gets up and asks them to see different colors, I am entitled to --

MR. LYON: I made the same argument last time.

MR. SHAW: I forgot.

THE COURT: Denied.

I see no harm in giving them, on the board.

The board doesn't take any position or anything else. It is a lot of sections and what not that is involved, and numbers of the statutes. You can't form any opinion from it whatsoever that I am aware of.

1
2 MR. LYON: My objection to the board is you
3 have a lot of initials there and abbreviations, and somebody
4 is liable to confuse it and make an argument based -- if
5 he is strong-willed enough, based on his memory of what
6 VPD means, or something of that sort --

7 THE COURT: We will simply say, then since it is
8 not evidence it cannot be used in the jury room. If they
9 want any part explained they can come out and I will explain
10 it to them. That's it.

11 MR. SHAW: We ought to agree.

12 Here is an indictment. They better double check
13 it.

14 MR. LYON: Shouldn't you cross out Joseph
15 Brasco and the heading?

16 MR. SHAW: In the box.

17 THE COURT: I think it makes sense. I would take
18 it out.

19 I took out the word "conclusions".

20 I am taking out 13 and 16.

21 MR. SHAW: Let the record show that the judge
22 has deleted that.

23 THE COURT: I will make a record when they come
24 in.

25 In fact, they are eating now. We will go into the

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jury room, it will be easier.

(In the jury room.)

THE COURT: Let me start off by saying bon appetit. Everybody is here and everybody has consented to come here rather than have you come out so you won't be inconvenienced.

Your note read: May we have the blackboard in here, the one with the Judge's explanation on it.

This was signed by the foreman.

That was not marked in evidence and therefore I cannot send it in here, but if there is anything you want explained that is on it at any time, just make a request and we will go out and explain whatever part of it you want explained to you. It is not in evidence.

Here is the copy of the indictment.

As I say, bon appetit.

(Lunchon recess.)

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(At 2 o'clock p.m. the following proceedings took place in open court.)

MR. SHAW: Is that Kagan? Your Honor, on page 939, the word, as printed, reads in one of the answers:

"Q How did that come up in the conversation?

"A Well, it was quite embarrassing to me. I had brought Weiner to Joe Doherty, and Weiner was supposed to help them get" -- and the next word printed is the word "alone." That clearly should be a loan."

THE COURT: I agree. That's the way it will read anyway. If I were certifying the record I could change it and I do change it. It is "a loan."

MR. LYON: I am requesting someone in the chair to read this.

MR. SHAW: No, your Honor.

THE COURT: Denied, since there is no unanimity of opinion. The request here is for the reporter to read it.

(Jury in box.)

THE COURT: The Court has received a note from the jury signed by the foreman, Mr. Eric Benjamin: Testimony of Kagan re call from Frank Brasco to phone number.

Then it said "Direct examination" and that was

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crossed out and it says "all testimony". Since it is only 13 pages anyhow, I am going to direct that all the testimony be read.

(Record read.)

THE FOREMAN: Thank you, your Honor.

(At 2:15 p.m. the jury retired to continue its deliberations.)

(Court Exhibit 25 was marked.)

(At 4:15 p.m. the following proceedings took place:)

(Court Exhibit 26 was marked.)

(Jury in box.)

THE COURT: I have a note which reads: Your Honor, the jury requests that you re-explain the term "conflict of interest" in layman's terms, if possible.

Well, the conflict of interest section, which is 203, appears under the following heading in the law: Compensation to members of Congress, officers and others, in matters affecting the government.

That's the heading of the section that Congress put to this particular conflict of interest.

The reading of the law, since I didn't read it to you before, may assist you in this area since you are interested in it. It reads as follows:

Whoever otherwise than is provided by law for

the proper discharge of official duties directly or indirectly receives or agrees to receive or asks, demands, solicits, or seeks any compensation for any service rendered, or to be rendered, either by himself or by another at a time when he is a member of Congress in relation to any proceeding, application, request for ruling, or other determination of contract, claim, controversy, charge, or accusation, or arrest, or other particular matter in which the United States is a party, or has a direct and substantial interest before any department, agency -- and then it goes on to court martials and other matters -- is guilty of a crime.

What essentially is being said, is stated, if you are a member of Congress, you are not to earn any money as a result of appearing for people or trying to help people in any governmental agency; and if you are going to do that, you must do it for nothing, and you must do it as a public service; if you don't do it and you get money for it, then there is a conflict of your interest as a Congressman and the government because they didn't hire you to go out and make money on this particular kind of operation.

MR. LYON: Can we have a side bar on that, your Honor?

THE COURT: Yes.

(At the side bar.)

MR. LYON: You are assuming that they are talking about conflict of interest with a Congressman. There also was initially a conflict of interest I raised with Tim May and Doherty. There is a subsection that says -- and I have it before me -- I can find it in a few minutes -- that when you represent somebody with whom you have to do business as a government representative, to represent him one year after you have left the government is a conflict of interest.

THE COURT: We will find out who they are talking about.

MR. SHAW: I assume they are talking about Brasco, but Tim May denied --

THE COURT: I will not go into that.

MR. LYON: They have a right --

THE COURT: Let me find out who they are talking about.

(In open court.)

THE COURT: Is your inquiry concerning the conduct of the defendant? It does not concern May or Doherty or anybody else?

THE FOREMAN: No. No.

THE COURT: Every juror is nodding in the negative. Therefore I see no need to go any further.

(At the side bar.)

MR. LYON: I don't know whether you made clear the question that there was compensation from somebody else outside of government in order for there to be a conflict of interest. You remember, you explained before that the Congressman has a right to pursue somebody's request of inquiry or talk on his behalf as long as it is not a question of money. I think you should explain that those two principles don't conflict, that he does have that right you said before, and the only time --

THE COURT: Not if he gets money for it.

MR. LYON: That should be cleared up.

THE COURT: I think I covered that.

MR. SHAW: They have asked for the definition of the crime of conflict of interest.

MR. LYON: They asked for an explanation.

THE COURT: I think I have explained it, and I decline to go further, with an exception to the defendant.

MR. LYON: I renew my request --

May I hear what you said?

THE COURT: He will read it to you.

(Record read.)

MR. LYON: I guess you said it.

(The jury retired to continue its deliberations.)

(At 4:30 p.m. the following proceedings took place; jury in box.)

THE COURT: I have another note which has just been handed up to me and it reads as follows: Please explain if other than money received, solicited, and so forth, involved in conflict of interest, particularly favor to relatives or friends, a criminal or other person.

MR. LYON: Your Honor, I didn't hear that.

THE COURT: I am reading exactly as it is.

It says: Please explain if other than money received solicited, et cetera, involved in conflict of interest -- and then there is a line; then it says: Particularly favor to a relative or friend -- and then in parenthesis: A criminal or other person.

There is a conflict of interest which does not have to involve money as such. It can involve what lawyers call consideration, that is, something of value. For the sake of argument, it could be a boat -- not that a boat is involved in this case. The money doesn't have to go directly to the Congressman, it can go to anyone, if, in fact, money is involved, provided he knows that that is being done and that he is participating in it, and he knows the money is being passed.

In this case, for example, if his uncle got the money and he didn't know a thing about it, and he never knew anything about it, and never knew his uncle got the money, then, of course, he would not be getting any money, and there would not be any conflict of interest. However, if he knew his uncle was getting the money, even if he didn't get any part of it himself, and he knew it was being done because his uncle was getting the money, that would violate conflict of interest even though the money never got back to him.

MR. LYON: I have an additional request.

(At the side bar.)

MR. LYON: What I am asking you to say is of course this applies only if they believe beyond a reasonable doubt that the uncle got money in the first place.

There is one other thing they asked for. They asked for favors to a man of criminal record. I think what they meant, if you benefit somebody with a criminal record, even if it is not money, is that compensation?

THE COURT: I will cover that.

MR. LYON: I think the law is clearly, unless you are getting some compensation for it that would not be a conflict of interest.

THE COURT: I will cover that.

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MR. SHAW: Your Honor, my position is that there is no need for another reasonable doubt charge in this context.

THE COURT: That's not a reasonable doubt charge.

MR. LYON: No.

THE COURT: He is not asking for that.

MR. LYON: I am saying they have to know that when you talk, if you got money from the uncle and knew he got it, they have to determine the uncle got it.

MR. SHAW: If you propose to do that and I ask that you let the jury know that this is only one of the objectives that is charged in the indictment, and a number of them have nothing to do --

THE COURT: I am not going to give them more than they ask for. That's what they asked for.

THE DEFENDANT: I understood the question to be, if I may, your Honor, whether or not, if my uncle recommended these people to me and there was nothing else involved, is that a conflict of interest? Is it a conflict of interest if one of them happened to be a criminal?

I think those were the two questions.

MR. LYON: When they said "favor to a relative," obviously they are saying if you intervened because your uncle suggested it, is that in and of itself a conflict of

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interest? If because the man was a criminal, is that in and of itself a conflict of interest?

It is obvious that that's what they asked for and, finally, as I said before, they should note that before they consider whether Frank Brasco knew about the money they first know he got the money.

MR. SHAW: I want to point out that the conflict of interest charge applies just as well to getting money on the loan as to this Joe Brasco thing. Your Honor cited that as an example. It does not apply to that. I want it to be very clear that if your Honor is going to make any further comment on that -- or, in any event, your Honor ought to indicate that this is not exclusively related to the \$10,000, to Joe Brasco. It applies to the loan transaction as well.

MR. LYON: They didn't ask about that.

THE COURT: They put it in a vague way.

MR. LYON: I could go along with that.

THE COURT: It does not say just money. It does not mention money at all. It says: If other than money was received, solicited, and so forth.

MR. LYON: It has to be something of value.

THE COURT: Particularly a favor.

MR. LYON: They're concerned with whether

just because his uncle asked him, and I think it is clearly not a conflict of interest, and just because Masiello was a criminal.

MR. SHAW: I agree with both. My only point is since you took the Joe Brasco thing as an example I want it explained to the jury it could apply to the loan as well.

MR. LYON: As long as they are told he has to receive money and you are to determine that the loan --

THE COURT: He doesn't have to receive it himself.

MR. LYON: Directly or indirectly, or know about it or want to or agree to it, but, Judge -- maybe this is the last question -- but that they first have to decide there was in fact a loan as they have to decide that there was in fact money passed.

THE COURT: The loan never went through.

MR. LYON: Or that there was even an agreement.

(In open court.)

THE COURT: You will recall that I said the nub of this case was: Was this done corruptly? Unless he does this corruptly then, of course, he has committed no crime.

When we are talking about conflict of interest, it is not only related to the \$10,000 we were talking about a little while ago, but it is also related, it may be related,

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if you find beyond a reasonable doubt that activity about the loan took place. In that particular area, of course we must keep that in mind too, the activity that took place at that time.

Take, for the sake of argument, the \$10,000 situation. Before you can consider whether or not the defendant had anything to do with that, you must find beyond a reasonable doubt, of course, that the uncle got the money, and that he got it for the purpose of effecting in the beginning, or at some point in time, some favorable consideration from Masciello's companies.

You must further find that this defendant either got part of the money or knew about the money, and approved the payment, or in some way was party to that action even though he didn't finally get any money himself if he knew his uncle got the money, and if he knew that that money was being passed for the purpose of getting his help as a Congressman that would involve him because that action would be corrupt. You would have to find that from the evidence in the case before you convict him, and you have to find that beyond a reasonable doubt.

AS far as the loan is concerned, if you find the activity there too was a result of the same continued conduct -- because you must realize that it is a principle

1 of law -- an Englishman discovered a principle in another
2 area when he was hit on the head with an apple while sitting
3 under a tree. Newton discovered some laws. He discovered
4 the laws of gravity and the law of inertia. The law of
5 inertia, it is presumed to be continued in motion until
6 something stops it. If it is at a standstill it will be
7 at a standstill until something sparks it.
8

9 The law of conspiracy, once a conspiracy is shown
10 to have begun, it is presumed to begin until such time as
11 it stops. There must be evidence to your satisfaction that
12 it did, in fact, stop.

13 In this particular concept, the conduct concerning
14 the \$10,000, and the loan, and all the others are related
15 if you find that, in fact, the money was passed in the
16 beginning and this other conduct took place after it.

17 So, if anything was received, either moneywise or any
18 other wise then, of course, that would be a corrupt act.

19 The fact that he does a favor for a man who turns
20 out to be a criminal later, if he doesn't know anything about
21 it and no money was received for this and no favors were
22 done corruptly for this so-called criminal, and he was
23 simply trying to help him the way he helped any other
24 constituent he had, that would not be a corrupt act.

25 So it is up to you to analyze his conduct and go

1 through it carefully and make a determination yourself as
2 to --
3

4 MR. LYON: They also asked about a relative,
5 a favor for a relative.

6 THE COURT: You can do a favor for a relative, but
7 you cannot take money for it. That's what it amounts
8 to. That's also included in this.

9 MR. SHAW: I will have to ask that we approach
10 the bench.

11 (At the bench.)

12 MR. SHAW: Your Honor, in the explanation that
13 you just gave, you broadened the matter out and talked about
14 the conspiracy itself. There is a portion of this conspiracy
15 which does not, in any way, shape or form relate or depend
16 upon money, and that is the conspiracy to defraud the United
17 States and to defraud the post office by corrupt acts,
18 the allegations of sham, and so forth. They have nothing
19 to do with either the receipt of money or the agreement to
20 receive it.

21 I understand that the jury came out and said they
22 wanted conflict of interest defined, but your Honor's
23 explanation a few moments ago in context of the whole
24 conspiracy leaves the distinct impression in their minds
25 they have to find either money or the agreement to receive

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money to convict, and they don't. That's not the indictment and it is --

MR. LYON: I will object to anything further.

THE COURT: That's as simple as that. I deny it.

MR. SHAW: Judge --

THE COURT: I deny it.

(In open court.)

THE COURT: You may retire and deliberate.

(Jury retired to continue with deliberations.)

MR. SHAW: Your Honor, would you at least tell them you have just specifically defined the conflict of interest objective?

THE COURT: That's the only thing we are talking about. That's the only thing we have been talking about, and that's all I answered. I do not think there is any confusion in their mind. I told him there are three different sections and a fourth one from the beginning. They are aware of that area. I will not regurgitate that part.

(Time noted: 4:42 p.m.)

(Dinner recess.)

(At 7:30 p.m. the following proceedings took place:)

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